



The Business Practices of Pharmacy Benefit Managers and Their Impact on Independent Pharmacies and Consumer Prices

Comments of the American Consumer Institute

April 20, 2022

The American Consumer Institute Center for Citizen Research (ACI) is a nonprofit (501c3) educational and research institute with the mission to identify, analyze and project the interests of consumers in selected legislative and rulemaking proceedings in information technology, health care, insurance, energy and other matters. The following are our “Public Comments on the Business Practices of Pharmacy Benefit Managers and Their Impact on Independent Pharmacies and Consumers.”

General Impacts

For the past several decades, health care costs have increased sharply as a proportion of U.S. national income and American families’ budgets. In recent years, rising drug prices have attracted particular attention. A Kaiser Family Foundation poll in 2021 revealed that 83% of U.S. adults believe the cost of prescription medicines is unreasonable and more than one-quarter of Americans find it difficult to afford their prescriptions.¹ Although many factors influence drug prices, the American Consumer Institute believes that improvements in the transparency and regulatory oversight of the pharmacy benefit manager (PBM) industry is an important step toward promoting consumer welfare.

¹ Hamel, L., Lopes, L., Kirzinger, A., Sparks, G., Kearney, A., Stokes, M. & Brodie, M. (April 2022). *Public Opinion on Prescription Drugs and Their Prices*. Kaiser Family Foundation, <https://www.kff.org/health-costs/poll-finding/public-opinion-on-prescription-drugs-and-their-prices/>.

As middlemen that interact with plan sponsors (e.g., employers, private insurers, and government health programs), pharmaceutical manufacturers, and pharmacies, PBMs exert enormous control over the U.S. drug industry. PBMs administer drug benefits for more than 266 million Americans.² In the late 1980s, as the complexity of pharmaceutical pricing, billing, and insurance coverage in the U.S. grew rapidly, the need for PBMs to facilitate interactions between manufacturers, insurers, and plan sponsors became clear. Indeed, economic evidence suggests that intermediaries in a transaction chain can improve an industry's efficiency through specialization and economies of scale.

Specific Business Conduct and Practices

It is now clear that the PBM industry is plagued by conflicts of interest and principal-agent problems, in which the PBM's financial incentives are not aligned with those of the plan's sponsor or beneficiaries. For example, PBMs often place manufacturers on their formulary that maximize their profits, rather than minimizing the costs of their sponsors. These perverse incentives are rooted in the lack of transparency in which PBMs are permitted to operate. The opacity of PBMs' transactions creates information asymmetries, a well-recognized market failure. PBMs' access to better information about costs and prices gives them leverage in their negotiations with other parties. In particular, PBMs have adopted a number of practices that raise anti-competitive concerns and merit regulatory scrutiny. Specifically:

- *Spread Pricing* – PBMs routinely charge plan sponsors more for a drug than they reimburse pharmacies, and pocket the difference. Since the PBM's negotiations with pharmacies are confidential, their plan sponsors have no way of knowing the extent of the spread. At the same time, spread pricing is enabled by the extreme concentration of the PBM industry. In 2021, three companies – CVS Caremark, Express Scripts, and OptumRx – controlled 80% of the total PBM market.³ This oligopolist structure limits

² Werble, C. (September 2017). *Pharmacy Benefit Managers*. Health Affairs. <https://www.healthaffairs.org/doi/10.1377/hpb20171409.000178/>.

³ Mader, J. (2022). *Pharmacy Benefit Managers: Market Landscape and Strategic Imperatives*, HIRC, <https://www.hirc.com/PBM-market-landscape-and-imperatives>.

competition and allows PBMs to extract additional price concessions from pharmacies by threatening to deny them access to a significant customer base. PBMs' use of spread pricing substantially inflates drug costs that are borne by consumers and, in the case of government health programs, taxpayers. The Congressional Budget Office estimates that eliminating spread pricing in the Medicaid program alone could reduce federal spending by nearly \$1 billion over the next decade.⁴ An audit in Ohio revealed that spread pricing allowed PBMs to pocket nearly 10% of all expenditures on prescription drugs in the state's Medicaid program.⁵

- *Formulary Manipulation* – As part of administering prescription drug plans, PBMs manage the formulary, a list of drugs available under the plan. In establishing the formulary, PBMs negotiate prices with manufacturers. In return for lower prices, PBMs often promise manufacturers higher sale volumes, more favorable formulary placement (i.e., on lower cost-sharing tiers), or commit to placing formulary restrictions on competing products. Essentially, PBMs limit price competition and restrict patients' access to treatments in return for deeper manufacturer discounts and rebates.
- *Pass-Thru of Rebates* – PBMs also limit on price competition in return for billions of dollars in manufacturer rebates that go opaquely from manufacturers to PBMs, and represent a saving not passed onto sponsors and consumers. In some cases, PBMs may also have an incentive to prefer high-priced drugs over more cost-effective options. Because PBMs rebates are usually calculated as a percentage of the manufacturer's list price, PBMs receive a larger rebate for more expensive drugs than they do for ones that may provide better value at a lower cost. As a result, people who have a high-deductible plan or have copays based on a drug's list price face significantly higher out-of-pocket costs. A study by the Center for Medicine in the Public Interest found that the vast

⁴ Analysis of Prescription Drug Pricing Reduction Act of 2019. (March 2020). Congressional Budget Office, <https://www.cbo.gov/system/files/2020-03/PDPRA-SFC.pdf>.

⁵ National Community Pharmacists Association. (2020). Spread Pricing 101. <https://ncpa.org/spread-pricing-101>.

majority of rebates PBMs collect are not passed through to patients. In fact, even as rebate revenue has soared in recent years, patient cost-sharing has increased.⁶

- *Clawbacks* – In many cases, particularly where generic drugs are concerned, a beneficiary’s copayment to fill a prescription may exceed the total cost of the drug paid by the PBM. While the beneficiary would be better off paying for the drug outside of their drug plan, PBMs deliberately prevent consumers from becoming aware of these overpayments by prohibiting pharmacists from disclosing relevant information to their customers.⁷ Clawbacks are rampant and constitute another revenue source for PBMs. An analysis in 2018 reported that 23% of pharmacy prescriptions from a large commercial insurer involved a patient copayment that exceeded the pharmacy’s reimbursement rate. Overpayments amounted to about \$10.51 annually per enrollee.⁸ Over the hundreds of millions of American enrolled in PBM-administered plans, clawbacks represent a non-negligible share of overall drug spending. Once again, this illustrates that PBMs have incentives to keep prescription costs high, instead of working on behalf of sponsors and beneficiaries to lower costs and maximize value.
- Accumulator adjustments – It’s an important topic for consumers facing high copays and deductibles, where some manufactures have programs to reduce the cost of very expensive lifesaving drugs. However, PBMs, have stepped in and do not allow the value of this savings to count towards patient out-of-pocket expenses. This means that the insurance coverage kicks in later, thereby leaving patients with no relief from the high cost of these lifesaving drugs.⁹

⁶ Goldberg, R. (2015). *Drug Costs Driven by Rebates*. Center for Medicine in the Public Interest, <http://bionj.org/wp-content/uploads/2015/11/drug-costs-driven-by-rebates.pdf>.

⁷ The Centers for Medicare and Medicaid Services is working to address this issue for those plans, but much more work needs to be done to end this shady practice.

⁸ Van Nuys, K., Joyce, G., Ribero, R. & Goldman, D. (March 2018). *Overpaying for Prescription Drugs: The Copay Clawback Phenomenon*, University of Southern California – Schaeffer Center for Health Policy & Economics, <https://healthpolicy.usc.edu/research/overpaying-for-prescription-drugs/>.

⁹ For examples of accumulator adjustments’ impact on arthritis, hemophilia, cancer, diabetes, and cancer patients, see <https://www.arthritis.org/advocate/issue-briefs/accumulator-adjustment-programs>, <https://www.hemophilia.org/news/copay-accumulator-adjustments-what-are-they-and-how-they-can-affect-you>,

Summary and Recommendations

In short, the PBM industry's financial incentives are often squarely at odds with the interests of their ostensible clients: plan sponsors and beneficiaries. Shielded from scrutiny by confidential agreements and secret negotiations, PBMs exploit their privileged position as middlemen to enrich themselves. Nowhere are the wholesale and average selling prices between the various parties published or transparent – not to drug manufacturers, not to consumers, not to pharmacies, and not to sponsors who offer their employees prescription plans.

To address these market failures and anticompetitive risks, ACI urges the Federal Trade Commission to consider the following remedies:

- Require PBMs to provide the formulary, information on deductions and other out-of-pocket costs, and any administrative burdens (including pre-authorization requirements) to consumers and employers *before* they sign up for a plan;
- Ensure that patients paying coinsurance and/or deductibles pay the negotiated price and not the full price for a drug;
- Allow pharmacies to disclose to customers when lower cost generics or over-the-counter medications are available outside of patients' drug plans;
- Allow pharmacists to disclose to patients when paying for a prescription without using their insurance benefits will result in lower out-of-pocket costs; and
- In cooperation with other federal agencies, including DHHS, exercise greater supervision over the pass-through of manufacturer discounts and rebates to plan sponsors, including collecting the information necessary to measure the extent to which pass-through is occurring, as well as prohibiting accumulator adjustments. The public should

<https://www.fightcancer.org/all-copays-count>, https://search-prod.lis.state.oh.us/cm_pub_api/api/unwrap/chamber/134th_ga/ready_for_publication/committee_docs/cmte_s_finance_1/testimony/cmte_s_finance_1_2021-06-03-0900_594/dougherty.pdf, respectively.

be informed, at a macro-level that does not compromise confidential data, of each PBM's performance on this metric.

We appreciate the opportunity to share our analysis and recommendations with the Commission, and look forward to providing further details and answering any questions that you may have.

Respectfully,

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