

The main logo for the report is centered. It features the "APCI" logo on the left, followed by a stylized blue pill bottle with green pills inside, and then the word "insights" in a large, blue, sans-serif font. Below this, the words "DRUG PRICING POLICY" are written in a smaller, blue, sans-serif font.

APCI insights

DRUG PRICING POLICY

OIG Audit of American Postal Workers Union Health Plan's PBM - Understanding the Findings and Implications From an Oversight, Contracting, and Policy Making Perspective

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Executive Summary

A recent Office of Inspector General audit of the American Postal Workers Union Health Plan's pharmacy benefits, administered by Express Scripts, uncovered over \$39 million in PBM overcharges. Despite the contract between the Carrier and the PBM being a pass-through agreement in which the plan is supposed to receive the value of the negotiated discounts, the audit found multiple instances of the PBM failing to pass through the full value of negotiated discounts from drug manufacturers and pharmacies.

While a large PBM overcharging a client to the tune of millions of dollars should raise eyebrows, there are two significant takeaways that are particularly noteworthy. First, the audit uncovered the withholding of millions of dollars in rebates earned through a PBM affiliated offshore rebate aggregator. Second, the audit findings and the PBMs responses are instructive on how non-drug specific discounts and fees can be used to obscure drug prices and to deprive PBM clients of the full value of negotiated price concessions from drug manufacturers and pharmacies.

Summary of Policy Recommendations

PBM Oversight & Contracting

- Oversight and audits of large PBMs should be top of mind for state and federal government agencies as well as self-funded employers who contract with large PBMs to administer their prescription drug benefits to ensure PBM accountability. Particular attention should be paid to identifying all rebates and discounts paid from drug manufacturers including to PBM affiliated rebate aggregators, and affiliated mail-order and specialty pharmacies.
- Contracting best practices should include strong audit rights, and ensuring contracts are pass-through with broad definitions of key terms to ensure all drug manufacturer, wholesaler, and pharmacy discounts are required to be passed through including all non-drug specific discounts. The use of transparent PBMs, devoid of conflicts of interest, should also be considered including affording transparent PBMs the opportunity to bid on potential contracts.

Legislative/Regulatory/Policy

- Advance legislation that prevents PBMs from setting and manipulating drug prices including through the use of rebate practices, trade secreted drug reimbursement methodologies, and self-dealing with vertically integrated rebate aggregators and mail-order and specialty pharmacies.
- Scrutinize whether large PBMs and insurer practices that leverage vertical integration to obscure and drive up the cost of drugs constitute anti-competitive behavior or unfair methods of competition.

I. The Plan and Contract

The Federal Employees Health Benefit Program ("FEHBP") was established by federal law to provide health benefits for federal employees and their dependents.¹ The Office of Personnel Management's Health Care and Insurance Office is responsible for the administration of the FEHBP and contracts with multiple health insurance carriers to administer health benefits.² One such insurance carrier is the American Postal Workers Union Health Plan ("Carrier") who in turns contracts with Express Scripts as its PBM who is responsible for administering the prescription drug benefits pursuant under the plan pursuant to a pass through contract.³ The contract specially provides that:

The PBM agrees to provide pass-through transparent pricing based on the PBM's cost for drugs . . . in which the Carrier receives the value of the PBM's negotiated discounts, rebates, credits, and other financial benefits.⁴

¹U.S. Office of Personnel Management Office of the Inspector General Office of Audits, "Audit of the American Postal Workers Union Health Plan's Pharmacy Operations as Administered by Express Scripts, Inc. for Contract Years 2016-2021, March 29, 2024, available online at:

https://www.oversight.gov/sites/default/files/oig-reports/OPM/2022-SAG-029_0.pdf.

²Id.

³Id.

⁴Id.

The OIG conducted the audit for contract years 2016 - 2021 “to determine whether the costs charged to the FEHBP, and the services provided to its members, were in accordance with the terms of the Contract, the Agreement, and applicable federal regulations.”⁵ The audit found, amongst other things, the following discrepancies:

- Over \$12.4 million overcharge via failure to pass through drug pricing discounts for retail pharmacy claims;
- Over \$5.9 million overcharge via failure to pass through drug purchasing discounts collected by the PBM for drugs filled by its own mail order and specialty pharmacies;
- Over \$2.2 million in retail pharmacy claim transaction fees that PBM charged pharmacies in administering the plans prescription drug benefits;
- Over \$4.9 million overcharge as a result of the PBM failing to pass through a portion of the rebates collected; and
- Over \$14.4 million in manufacturer rebates withheld by PBM rebate aggregator sister company.⁶

The Carrier, in conjunction with the PBM, responded to the preliminary audit findings, and, with limited exception, took issue with the audit results, disputing that money was wrongfully withheld.⁷

II. Rebates

One of the central practices of large PBMs is to negotiate rebates and discounts from drug manufacturers in exchange for favorable formulary placement.⁸ While there are serious policy questions to be asked of the role PBM rebate practices play in driving up the cost of drugs for patients at the counter and limiting access to medications,⁹ under pass-through contracts, the payor should be receiving those rebate dollars back from the PBM. Recall, here, the contract requires the PBM to pass through the value of the “negotiated discounts, rebates, credits, and other financial benefits.”¹⁰ Despite the contractual requirements, the audit found that \$4.9 million in what we will call traditional rebates were not passed back to the plan.¹¹ A problematic finding to be sure but given what we know about the practices of large PBMs, this is hardly a ground breaking finding.

However, two other findings with regard to drug manufacturer rebates were particularly noteworthy.

First, the audit identified \$14.4 million in drug manufacturer rebates that were paid to Ascent Health Services, an Express Scripts affiliate housed overseas that serves as a rebate aggregator.¹² PBM affiliate rebate aggregators serve as a group purchasing organizations for PBMs used to negotiate rebates and other price concessions.¹³ These PBM affiliate rebate aggregators have garnered significant attention as of late with drug pricing experts and some policy makers weary that this is yet another attempt of large PBMs to leverage their vertical integration for their own benefit, this time adding a layer outside of the PBM-client relationship adding more opacity in rebates earned and due to PBM clients, even clients with pass-through contracts.¹⁴

This finding of \$14.4 million in drug manufacturer rebates collected by Ascent Health and not passed through to the client is significant in that it appears to confirm the risk of PBM affiliated rebate aggregators failing to pass through all drug manufacturer rebates is indeed real.

⁵Id.

⁶Id.

⁷Id.

⁸Frier Levitt - commissioned by the Community Oncology Alliance, “Pharmacy Benefit Manager Expose: How PBMs Adversely Impact Cancer Care While Profiting at the Expense of Patients, Providers, Employers, and Taxpayers,” February 2022, available online at: https://communityoncology.org/wp-content/uploads/2022/02/COA_FL_PBM_Expose_2-2022.pdf.

⁹Id.

¹⁰U.S. Office of Personnel Management Office of the Inspector General Office of Audits, “Audit of the American Postal Workers Union Health Plan’s Pharmacy Operations as Administered by Express Scripts, Inc. for Contract Years 2016-2021, March 29, 2024, available online at: https://www.oversight.gov/sites/default/files/oig-reports/OPM/2022-SAG-029_0.pdf.

¹¹Id. (the PBM agreed to return approximately \$1.8 million of the disputed \$4.9 million).

¹²Id. (according to the Final Audit Report, “the PBM asked to resolve the finding expeditiously, and willfully credited the Carrier approximately \$14.4 million for rebates withheld be Ascent).

¹³Federal Trade Commission, “FTC Deepens Inquiry in Prescription Drug Middlemen,” May 17, 2023, available online at: <https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-deepens-inquiry-prescription-drug-middlemen>.

¹⁴Id.

The audit also identified \$5.9 million in drug manufacturer and wholesaler purchasing discounts earned related to the PBM's affiliate mail-order and specialty pharmacies.¹⁵ The Carrier/PBMs response to this finding is instructive. Specifically, the PBM maintains, amongst other things, these discounts were “non-specific drug discounts,” which are received based upon total purchases made from drug manufacturers and wholesalers and thus it was not under an obligation to pass those discounts through despite the fact that these “non-specific drug discounts would not have been received without the FEHBP's drug utilization.”¹⁶

The PBM's failure to pass through \$14.4 million in drug manufacturer rebates paid to its affiliate rebate aggregator and the \$5.9 million in discounts earned related to its affiliate mail-order and specialty pharmacies reflect emerging practices employed by PBMs wherein they can leverage their affiliate entities in a manner to avoid passing rebates and other discounts back to clients who enjoy pass through pricing contracts.

III. Pharmacy Discounts and Fees

As indicated above, a pass-through contract with a PBM should ensure that a PBM is passing through all discounts and price concessions to its client. While this sounds like a simple enough concept, the OIG audit findings, and the Carrier and PBM's response reveal that in drug pricing, nothing is as simple as it sounds.

The audit found there was in excess of \$12.4 million in PBM negotiated pharmacy discounts that were not passed back pursuant to the requirements of the pass-through contract.¹⁷ This overcharge was the result of the PBM using a higher reimbursement rate for FEHBP's pharmacy claims than the discounts negotiated in the reviewed retail pharmacy agreements.¹⁸ The Carrier and the PBM's response, amongst other things, is that the PBM negotiates non-client specific aggregate pricing guarantees and that these non-client specific aggregate guarantees are not subject to the pass-through requirements.¹⁹ This position is eye-opening, and should be cause for concern for clients of large PBMs, particularly in light of the trend of large PBMs to contract with pharmacies utilizing aggregate pricing methodologies such as effective rate guarantees.²⁰

The audit also uncovered over \$2.2 million in retail pharmacy transaction fees which were similarly not passed through to FEHBP.²¹ The PBM's position is that because these transaction fees are not tied to the price of drugs they are not required to be passed back to the FEHBP despite the broad definition of “pass-through transparent pricing,” in the agreement.²²

Conclusion

Despite the requirements of the pass-through contract, the FEHBP was denied drug manufacturer rebates paid directly to the PBM, drug manufacturer rebates paid to the PBM's affiliate rebate aggregator, drug manufacturer and wholesaler rebates and discounts tied to PBM affiliate mail-order and specialty pharmacies, pharmacy discounts, and pharmacy transaction fees.

While this audit was PBM specific, the use of PBM affiliated rebate aggregators, PBM affiliated mail-order and specialty pharmacies, aggregate non-drug specific pricing methodologies, and pharmacy transaction fees are common amongst large PBMs. As such, these audit findings should be cause for concern for federal, state, and local governmental agencies, as well as self-funded employers responsible for the administration of prescription drug benefits.

However, these findings are also deeply instructive and should help shape contractual requirements, be a catalyst for scrutiny of large

¹⁵U.S. Office of Personnel Management Office of the Inspector General Office of Audits, “Audit of the American Postal Workers Union Health Plan's Pharmacy Operations as Administered by Express Scripts, Inc. for Contract Years 2016-2021, March 29, 2024, available online at: https://www.oversight.gov/sites/default/files/oig-reports/OPM/2022-SAG-029_0.pdf.

¹⁶Id.

¹⁷Id.

¹⁸Id.

¹⁹Id.

²⁰3 Axis Advisors, “Unraveling the Drug Pricing Blame Game,” September, 2023, available online at: https://static1.squarespace.com/static/5c326d5596e76f58ee234632/t/650924780b6b9c590edfa2b4/1695097983750/Unravelling_the_Drug_Pricing_Blame_Game_3AA_APCI_0923.pdf.

²¹U.S. Office of Personnel Management Office of the Inspector General Office of Audits, “Audit of the American Postal Workers Union Health Plan's Pharmacy Operations as Administered by Express Scripts, Inc. for Contract Years 2016-2021, March 29, 2024, available online at: https://www.oversight.gov/sites/default/files/oig-reports/OPM/2022-SAG-029_0.pdf.

²²Id.

PBM practices under current contracts, and trigger action from policy makers looking to increase transparency, lower prescription drug costs, and protect payors, patients, and independent pharmacies from unfair practices of large PBMs.

For agencies and employers with existing PBM contracts, scrutiny should include:

- Oversight and audits of PBM performance under current agreements. Audits should include, within audit rights of contract, review of retail, mail order, and specialty pharmacy claims pricing as well as select high volume retail pharmacy agreements with the PBM, information related to all pricing discounts from drug manufacturers and wholesalers including those related to volume discounts for prescription filled from PBM affiliated mail-order and specialty pharmacies, and review of drug manufacturer agreements between the PBM and any contracted or affiliated rebate aggregators to verify pass-through rebate amounts.
- In addition, agencies, employers, and policy makers should guard against overly close relationships between those tasked with contracting and overseeing contracts with PBMs and the PBM itself. The Carrier's responses to the audit findings, crafted apparently in conjunction with the PBM underscore the often overly cozy relationship between insurers and PBMs, even when not affiliated.

With regard to forward looking contracting with a PBM, considerations should include:

- Contract should be pass-through and careful attention should be paid to defined contract terms in PBM agreements to ensure that a pass-through contract will indeed require a PBM to pass through all discounts including rebate dollars funneled through PBM affiliate rebate aggregators, PBM affiliate mail-order or specialty pharmacy, and third parties.
- Contracts should include language to ensure non-drug specific discounts including pharmacy effective rate discounts, pharmacy transaction fees, and wholesaler and drug manufacturer discounts paid to rebate aggregators, PBMs, and PBM affiliate mail-order and specialty pharmacies are required to be passed back to the client.
- Contracts should include strong oversight and audit capabilities including, without limitation, the ability to review PBM agreements with retail pharmacies and pharmacy claims pricing, and the ability to review drug manufacturer and wholesaler agreements and payment records.
- Consideration of using a transparent PBM devoid of conflicts of interest and ensuring that any RFP/bid process does not exclude transparent PBMs from participation/consideration.

For lawmakers, regulators, and policy makers, the audit findings are also instructive. Some takeaways include:

- Advance legislation that takes away the ability of PBMs to set and manipulate drug prices. This can be done through the use of index-based pricing such as the national average drug acquisition cost, prohibitions on steering to PBM owned/affiliated pharmacies, the use of point of sale and retroactive fees that enable PBMs to create spreads between what pharmacies are reimbursed and what plans are charged, and delinking PBM and insurer compensation from the price of prescription drugs.
- Consider policies and implications with regard to rebate practices. Considerations should include whether patient cost shares should be based on gross or net drug prices, and including strong definitions in any legislation seeking to address PBM rebate practices to ensure rebates and discounts that are negotiated flow through to clients or patients, as applicable.
- Scrutinize whether large PBMs and insurer practices that leverage vertical integration to obscure and drive up the cost of drugs constitute anti-competitive behavior or unfair methods of competition.