Statement for the Record: The National Community Pharmacists Association (NCPA)

United States House of Representatives Energy and Commerce Committee Subcommittee on Oversight and Investigations

Hearing: "Examining the Impact of Health Care Consolidation"

February 14, 2018

Chairman Harper, Ranking Member DeGette, and Members of the Subcommittee:

Thank you for conducting this hearing to explore consolidation in the health care industry and more important its effects on patients and consumers. In this statement, NCPA would like to present our thoughts on how the increased consolidation in the Pharmacy Benefit Manager (PBM) marketplace is contributing to higher consumer costs and impacting consumer choice when it comes to their pharmacy provider. PBMs are "middlemen" in the supply chain that determine formulary composition, pharmacy networks, and ultimately costs for consumers and plan sponsors, among other roles.

NCPA represents America's community pharmacists, including the owners of more than 22,000 independent community pharmacies. Together they represent an $80 billion health care marketplace and employ more than 250,000 individuals on a full or part-time basis. Independent community pharmacies are also typically located in traditionally underserved rural and urban communities, providing critical access to residents of these communities.

Concentrated PBM Marketplace

Due to mergers over the past several years, just three large companies now dominate the PBM market, and these three companies collect more than $200 billion a year to manage prescription services for insurance

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carriers covering 180 million Americans and government programs servicing about 110 million more.[1] In addition, the largest PBM has increased its profit per-adjusted prescription 500 percent since 2003.[2]

In fact, a 2017 report by the American Consumer Institute noted "because of recent mergers, the PBM market has increased in concentration, and that provides negotiating leverage which enables them to extract additional revenues and earnings."[3] The report further highlighted the market distortion between PBMs and pharmacies which has been exacerbated by consolidation, "[i]ncreased market concentration has allowed PBMs to become price-makers, and pharmacies as price-takers."[4]

Moreover, a 2015 hearing by the House Judiciary Committee Subcommittee on Regulatory Reform, Commercial and Antitrust Law raised additional concerns over consolidation in the PBM marketplace. Thomas Greaney, a Professor of Law at St. Louis University School of Law, testified at the hearing and suggested that it may be time for the FTC to review the PBM market and the effects of consolidation considering its previous decision to allow the merger of two of the largest PBMs, Express Scripts and Medco. At the same hearing, now FDA Commissioner, Scott Gottlieb, voiced concerns over PBMs using their increased market power to capture revenue from other market participants. He noted this would be less concerning if it were easier for new PBMS to start up or smaller PBMs to grow, but he concluded, "[q]uite frankly I think the health plan consolidation will make it harder for smaller PBMs to continue to grow and will potentially give more market share to some of the existing large PBMs."[5]

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[1] *How 'price cutting' middlemen are making crucial drugs vastly more expensive*, *available at* http://www.latimes.com/business/hilzik/la-fi-hiltzik-pbm-drugs-20170611-story.html.

[2] Investor's Business Daily, Nov. 21, 2016, *available at* http://www.investors.com/politics/commentary/a-sick-calculation-about-prescription-drugs/.

[3] Pociask, Steve, *Pharmacy Benefit Managers: Market Power and Lack of Transparency*, p. 5, March 7, 2017, *available at* http://www.theamericanconsumer.org/2017/03/10882/.

[4] *Id.*

[5] *The State of Competition in the Health Care Marketplace: The Patient Protection and Affordable Care Act's Impact on Competition: Hearing before the House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law*, p. 120, Sept. 10, 2015, *available at* https://judiciary.house.gov/wp-content/uploads/2016/02/114-46_96053.pdf.

Effects of PBM Consolidation on Consumers and Payers

A recent report from the White House Council of Economic Advisers noted the effects that PBM consolidation is playing in the marketplace stating that the three large PBMs account for 85 percent of the market, "which allows them to exercise undue market power against manufacturers and against the health plans and beneficiaries they are supposed to be representing, thus generating outsized profits for themselves."[6]

For large programs, including government-funded programs like Medicare Part D and the Federal Employee Health Benefits Program (FEHB), as well as large private employer-sponsored plans, there are few alternatives to these three PBMs that are large enough to manage such programs. Thus plan sponsors for these programs have limited choices. And while these three large PBMs may claim their size enables them to achieve market efficiencies, there is no requirement that these savings be passed along to plan sponsors and consumers. As the American Consumer Institute noted, "there is no market pressure for the PBMs to flow these savings through to sponsors or to consumers."[7] With patient out of pocket costs and premiums continuing to rise, there is evidence to suggest that these savings are not, in fact, being passed on.

The market power PBMs exert also allows them to dictate contract terms to pharmacies, and in some cases exclude certain pharmacies from their networks altogether, limiting consumer choice. Community pharmacies routinely must agree to take it or leave it contracts. Such contracts often include blind price terms and other provisions that disadvantage community pharmacies and their patients. The PBMs also push plan sponsors to adopt plan designs that favor usage of a retail, mail order, or specialty pharmacies in which the PBM has an ownership interest. Thus consumers may find it difficult to fill their medication at their pharmacy of choice. When they can, their pharmacy may be filling the medication at a loss due to the PBM's reimbursement formula. This conflict of interest must be addressed.

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[6] The Council of Economic Advisors, *Reforming Biopharmaceutical Pricing at Home and Abroad*, p. 11, Feb. 2018, *available at* https://www.whitehouse.gov/wp-content/uploads/2017/11/CEA-Rx-White-Paper-Final2.pdf.
[7] Pociask, p.6.

PBM Industry Largely Unregulated

Given the immense market influence that PBMs exert, one would expect these entities to be subject to the same type of comprehensive regulation that is currently required of commercial health insurers. However, PBMs are **not** subject to industry-wide regulation similar to what is generally required of commercial health insurers. There are no federal laws or regulations that are specific to the PBM industry. Instead, PBMs face a patchwork of regulations at the state level that are designed to curtail some of the more onerous PBM business practices such as abusive PBM audits of pharmacies and requirements that PBMs update their maximum allowable cost (MAC) lists in a timely fashion. These MAC lists are used to determine pharmacy reimbursements for many generic medications and need to be updated regularly to reflect current market conditions. The PBMs routinely argue that federal laws such as ERISA preempt state initiatives to enforce regulations over them. At the same time, the PBMs aggressively assert that they are not subject to regulation under ERISA or other federal laws. As a result, the PBMs have capitalized on seemingly falling within a regulatory netherworld.

CVS Health -Aetna Inc. Merger and Its Potential Impact on Consumers

The pending merger between CVS Health and Aetna Inc. should be subject to strict scrutiny. While the merging parties claim they will create efficiencies in the marketplace, there are serious questions as to whether the purported savings with be passed on to plan sponsors and consumers. In addition, the merged entity with likely force or incentivize consumers to use providers associated with CVS Health and Aetna Inc. rather than the health providers of their own choosing, limiting consumer choice and potentially quality. Thus, a close examination of whether this acquisition will lead to higher drug prices and lower quality and fewer convenient pharmacy options for consumers is warranted.

Conclusion

The health care system continues to consolidate, especially when it comes to the PBM marketplace. More so, drug prices continue to increase, consumers are provided fewer choices where they can obtain their medications, payments to pharmacies are decreasing while costs to consumers are increasing and PBM profits continue to grow. Thus, any cost efficiencies obtained by the PBMs do not appear to be sufficiently trickling down to payers and consumers.

Members of this subcommittee should be concerned with this trend and how PBM actions are affecting taxpayer- funded programs given the fact that the federal government is the largest single payer of health care in the United States.[8] It is incumbent upon Congress to demand accountability to ensure a competitive marketplace that enables consumer choice by supporting common-sense legislative solutions.

[8] Troy, Tevi D., American Health Policy Institute, *How the Government As a Payer Shapes the Health Care Marketplace*, 2015.