Federal Trade Commission

600 Pennsylvania Avenue, NW

Washington, DC 20580

By Electronic Mail ([vgraham@ftc.gov](mailto:vgraham@ftc.gov))

Re: Draft FTC-DOJ Merger Guidelines

September 5, 2023

Dear Commissioner Khan,

Northeast Pharmacy Service Corporation (NPSC) is a pharmacy service administrative organization (PSAO) that provides services to independent community pharmacies in New England with group purchasing opportunities, third party consultation, advocacy, regulatory affairs along with education and training on new business development.

On behalf of NPSC and its participating pharmacies, we would like to thank you for allowing us to file our comments regarding the Draft FTC-DOJ Merger Guidelines.

As a leading voice for Massachusetts independent pharmacy, we applaud the Commission’s efforts to help level the playing field when it comes to the unfair business practices that pharmacy benefit managers (PBM’s). Their operating practices consistently harm both pharmacies and patients. NPSC offers its full support for these draft merger guidelines.

There have been too many mergers and acquisitions in the PBM space over the last 20+ years. Their unchecked and abusive business practices have directly resulted in less competition in the marketplace. What is needed is for the Federal Trade Commission to take a more aggressive stance in scrutinizing these mergers rather than continuing to allow them to further damage the marketplace.

We believe that the June 1, 2023 viewpoints from the National Association of Insurance Commissioners both plainly and accurately summarizes the story that stakeholders like us see on a day to day basis:

***Background:*** *When insurance companies began offering prescription drugs as a health plan benefit in the 1960s, PBMs were created to help insurers contain drug spending. Originally, PBMs decided which drugs were offered in formularies and administered drug claims. In the 1970s, PBMs began to adjudicate prescription drug claims. In the 1990s, drug manufacturers began acquiring PBMs. Concerns about conflicts of interest caused federal orders for divestment from the Federal Trade Commission, sparking a trend of mergers and acquisitions within the PBM field.*

*Today, there are 66 PBM companies, with the three largest – Express Scripts (an independent publicly-traded company), CVS Caremark (the pharmacy service segment of CVS Health and a subsidiary of the CVS drugstore chain), and OptumRx (the pharmacy service segment of UnitedHealth Group Insurance) – controlling* [***approximately 89%***](https://content.naic.org/sites/default/files/inline-files/NCPA%208-29-19.pdf) *of the market and serving about* [***270 million***](https://www.pcmanet.org/value-of-pbms/) *Americans.*

*PBMs work in conjunction with drug manufacturers, wholesalers, pharmacies, and* [***health insurance***](https://content.naic.org/cipr_topics/topic_health_insurance.htm) *providers but play no direct role in the physical distribution of prescription drugs, only handling negotiations and payments within the supply chain. When a new drug is available, the manufacturer negotiates with wholesalers who then sell and distribute drugs to pharmacies. PBMs negotiate agreements with drug manufacturers on behalf of insurers and are paid rebates by drug manufacturers. Pharmacy Services Administrative Organizations (PSAOs) negotiate reimbursements with PBMs on behalf of pharmacies. PBMs then pay pharmacies on behalf of health insurance providers for drugs dispensed to patients. PSAOs and PBMs are both third party companies with different functions and purposes. PSAOs represent and offer services to independent pharmacies and PBMs represent health insurers.*

*Pharmacy Benefit Managers earn profits primarily through administrative fees charged for their services, through spread pricing (the difference between what is paid to pharmacies and the negotiated payment from health plans), and shared savings where the PBM keeps part of the rebates or discounts negotiated with drug manufacturers. Concerns with PBM business practices focus on transparency to consumers regarding rebates and reimbursements. ‘Gag clauses,’ provisions in contracts between PBMs and pharmacies that prevent pharmacists from telling patients when the cash price of a drug is less than the insurance copay price, were banned in 2018 by the* [***Patient Right to Know Drug Prices Act, S.2554***](https://www.congress.gov/bill/115th-congress/senate-bill/2554/text) *and the* [***Know the Lowest Price Act, S.2553***](https://www.congress.gov/bill/115th-congress/senate-bill/2553/text) *to promote transparency toward patients. In a 2019 study, the Government Accountability Office reported that PBMs retain less than 1 percent of rebates in a review of Medicare Part D plans, while passing the rest on to consumers. Medicare Part D rebates accounted for* [***$18 billion***](https://www.gao.gov/assets/710/700259.pdf) *of the $26.7 billion in rebates in 2016. A study conducted by the Office of Inspector General found that in Part D, rebate-adjusted unit costs increased at almost the same rate as non-rebate-adjusted costs in a 5-year period.*[[1]](#footnote-1)

NPSC has both written and advocated for laws across New England for our participating pharmacies. Other groups and associations across this country have done the same. In fact, all fifty (50) states[[2]](#footnote-2) have passed PBM legislation on several topics ranging from maximum allowable cost, any willing provider, audits, gag clauses, licensure, claw backs and the like. However, while

it has been a relief to have state PBM legislation, state oversight is sporadic. We need not only federal legislation but an FTC willing to enforce the Clayton Act in a meaningful way to avoid marketplace concentration. We have been highly encouraged by the actions of the FTC under your leadership.

As far as the actual proposed draft merger guidelines are concerned, we agree with everything proposed. We are aware of the FTC’s updates to these guidelines since 1968. With the current marketplace that pharmacies are working in being so out of balance, we believe we need a revised set of guidelines that captures the essence of what community pharmacies face today.

We appreciate you allowing us to pass along our viewpoints and we stand by to readily serve as a resource to you.

Sincerely,

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Patricia Monaco Ron Lanton III, Esq. David G. Benoit, MHP, RPh.

President/CEO Corporate Counsel VP, Patient Care Services

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1. National Association of Insurance Commissioners (NAIC); Center for Insurance and Policy Research, *Pharmacy Benefit Managers*, June 1, 2023 <https://content.naic.org/cipr-topics/pharmacy-benefit-managers> [↑](#footnote-ref-1)
2. National Academy for State Health Policy; *State Pharmacy Benefit Manager Legislation*, <https://nashp.org/state-pharmacy-benefit-manager-legislation/#:~:text=As%20Congress%20advances%20pharmacy%20benefit,state%20PBM%20legislation%20through%202022.> [↑](#footnote-ref-2)