Speaker 1:

Good afternoon everyone. This meeting will come to order. We are meeting in open session today to consider certain items before the commission. We had an overwhelming response from speakers interested in sharing their concerns. Without further ado, I will turn it over to Lindsay Krisak.

Lindsay Krisak:

Thank you, Madam chair. Before we begin, please note that the FTC is recording this event, which may be maintained, used, and disclosed to the extent authorized or required by applicable law regulation or order. And it may be made available in whole or in part with the public record accordance with the commission's rules. At this time, I'd like to welcome the honorable representative John Rose of Tennessee's sixth congressional district to share some remarks. Congressman.

John Rose:

Thank you, Lindsey. And thank you Madam chair and members of the commission for calling this meeting and allowing members of the public to submit comments on the important issue affecting the lives and livelihoods of people all across the country, and certainly right here in middle Tennessee in the sixth district of Tennessee that I represent. Last August in my district, I convened a community pharmacy advisory council meeting, where I heard from numerous pharmacies that have alleged that anti-competitive contracting policies from Pharmacy benefit managers, or PBMs as they're known, are significantly hurting their independently owned businesses.

John Rose:

For many small town rural communities in my district, these longtime local pharmacies are often the sole provider of life saving access to medical prescriptions and other services and consultation. Unfortunately, PBMs, like the three largest Aetna Cigna and United health group, collectively control 77% of the market and have made serving communities much more difficult for these family owned pharmacies. PBMs have put local of pharmacies under enormous pressure by leveraging their market power and develop and their business relationships to drive up cost to community pharmacies, especially through the use of take it or leave it contracts. My constituents and I strongly support the federal trade commissions study of PBMs and any FTC efforts to ascertain PBMs individual pharmacy clawback information.

John Rose:

Currently PBMs will not allow pharmacies to disclose this information, so the FTC must request it. I applaud any effort to bring desperately needed transparency to PBMs practices and strongly urge the FTC to utilize every tool and resource available to aggressively collect information on PBMs, their anti-competitive behavior. If we don't act decisively act soon, more and more mom and pop pharmacies around the country, like my own that has served me so well throughout my life, will be forced to close because they cannot cope with the unfair conditions placed on them by pharmacy benefit managers who operate with little or no public transparency. Thank you to the commission and thank you for the opportunity to speak with you today.

Lindsay Krisak:

Thank you Congressman for your remarks. We will now hear a video submission from the honorable rep Buddy Carter from Georgia's first congressional district.

Buddy Carter:

Hello, I'm Congressman from Buddy Carter. I represent Georgia's first congressional district and I sit on the house energy and commerce health subcommittee. I'm a registered pharmacist and now on my own independent pharmacy in Georgia for over 30 years. So I'm familiar with PBMs from running a business as well as being a policy maker. I want to stress the importance of today's vote to authorize a six piece study to investigate Pharmaceutical Benefit Managers. PBMs have grown into some of the largest, most profitable companies in our nation, but they have done this at the expense of small business owners and most importantly, patients. PBMs act as middlemen and the drug supply chain, and they play an outsized role in the per state of the current American prescription drug market. There are a few practices I want to point to today that must be investigated and addressed. PBMs retain fees after a pharmacy is dispensed medication often referred to as direct and indirect enumeration are DIR fees.

Buddy Carter:

PBMs have increased these retro active fees by 91500% in recent years, that's like a gallon of milk now costing more than $3,600. They also blackmail manufacturers to increase drug list price in exchange for more rebates. The PBM stem pocket these rebates instead of passing the savings onto the customer. This practice drastically increases drug cost, even despite branded drug product list priced on average decreasing for the fourth year in a row now. PBMs also steer patients into their own integrated pharmacy or mail order pharmacy. In fact, my wife received a phone call from a PBM telling her she could get a drug through the PBM mail order cheaper than she did at my own pharmacy. This is merely a way for PBMs to move patients away from independent pharmacies and put them out of business. State Medicaid programs are also paying billions to PBMs through convoluted spread practicing contracts. This study must be authorized and I look forward to working with the FTC further. I appreciate the time to testify today.

Lindsay Krisak:

Thank you Congressman for those remarks. We'll now hear from the members of the public. Each speaker will be given two minutes to address the commission. Our first speaker is Diane Jens, Diane.

Diane Jens:

Good afternoon. Thanks for giving me the opportunity to voice my opinions and concerns. As Lindsay said, my name's Diane Jens, I'm in Northeast Ohio. I'm a 45 year plus veteran of the bicycle industry. Most of it as a retail store owner and operator, as well as hosting and producing a podcast about bicycles and bicycling for the past 11 years. I'm witnessing two alarming trends that I believe are squeezing the small independent bicycle shops out of existence.

Diane Jens:

Both of these trends are probably related, although I can't be certain of that. The first is the purchase of small bicycle shops by Trek and Specialized, the two largest bicycle manufacturers in the US. They are either turning these stores into company stores, featuring their own brands or closing those shops that may not fit their business plans. To say this cuts down on competition is pretty obvious. The second is the continued scarcity of parts and components, including repair parts, such as tires, tubes, and chains, to name but a few. While some are attributing this lack of products to a variety of supply chain issues, the big two, Specialized and Trek seemingly have no trouble equipping their bikes and giving their shops access to repair parts.

Diane Jens:

I believe all of this will do a great disservice to not only the small bicycle independent shops, but the communities at large who depend on these small shops for sales and service. I would ask that the FTC look into what I believe might be an effort to not only control the supply chain, but also competition and in turn pricing. Thank you for your attention. I appreciate it.

Lindsay Krisak:

Thank you Diane. Our next speaker is Steven Moore. Steven.

Steven Moore:

Hi, good afternoon. Thank you. My name is Steve Moore. I'm a community pharmacist from Plattsburgh New York, and I really appreciate the opportunity to be here today. To get right into it, some of the highlights of the anti-competitive PBM business practice that I've observed include spread pricing, repackaging and AWP inflation, copay, TrOOP, formulary, and rebate manipulation, patient during a mandatory mail order, Predatory audit practices, draconian prior approval practices, mandates from where medications may be purchased and being locked out of PBM owned and specialty distribution channels. Here in New York thanks to the word of PI three access advisors and our state Senate investigations committee PBM practices were shown to be detrimental to patients, to pharmacists, allied healthcare providers, and the tax payers.

Steven Moore:

Yet, even today, patients still don't know who to turn to when they have problems getting the medication they need. Pharmacists are still afraid to speak out and risk having their contracts terminated. Employers are still afraid to speak out and be sued for breach of contract and the state is still struggling to mitigate the harm done to our Medicaid program. The level of vertical integration that PBMs have been allowed to engage in continues to present additional challenges and New York's PBM problems are far from unique. PBM destruction of our community based healthcare infrastructure cannot be allowed to continue. And as 50 different states try to regulate these fortune 25 companies with varying degrees of success, it has become apparent that federal intervention is necessary to level the playing field and ensure that every patient in the country has access to the medications they need when they need them and at prices they can afford.

Steven Moore:

I will close by saying that it wasn't the PDMs, their mail order or their specialty pharmacies on the frontline, serving their communities throughout the COVID 19 pandemic. Despite all the pharmacies work with testing, with vaccination and with monoclonal antibody therapy, we need to look no further than last month's rollout of COVID 19 oral antivirals. For an example of how when left to their own devices, PBMs implement practices that are outdated, exclusionary and design with only their bottom line in mind. Thank you, please. Don't ever hesitate to reach out with questions or comments.

Lindsay Krisak:

Thank you Steve. Our next speaker is Beth Waldron, Beth.

Beth Waldron:

Yes, I am a patient in Chapel Hill, North Carolina. In November, I received a letter from my Pharmacy Benefit Manager, CVS Caremark informing me that my blood thinning medication I've been stable on for the past eight years, Eliquis, will no longer be covered and I need to change to another brand, Sorrento. 150,000 stable patients at high risk for cardiovascular events like me were also impacted. Caremark controls the prescription access for one in three Americans. Clinical studies show Eliquis to have superior effectiveness and safety compared to Sorrento. Eliquis is taken by 3 million Americans, including President Joe Biden. The removal of Eliquis from formulary was seen as so dangerously disruptive that 16 cardiovascular nonprofits asked Caremark to reverse their decision, including the American College of Cardiology and the American Society of Hematology. Still, Caremark proceeded.

Beth Waldron:

Patients are captive PBM consumers. We do not choose a Pharmacy Benefit Manager, our insurance plan does. Patients do not have the ability to change PBMs if we do not like their policies, service or formulary. We have no recourse yet PBMs have wide latitude over our lives by determining which drugs we can access, at what price, even have the power to switch our medications over the direct prescribing advice of our physicians. These are the very conditions in which federal consumer protections are needed. I encourage the FTC to please get engaged, to help protect consumers from PBM practices, such as the non-medical switching I've just experienced. Thank you.

Lindsay Krisak:

Thank you Beth. Our next speaker is Benjamin Jolien, Benjamin.

Benjamin Jolien:

Commissioners and chair [inaudible 00:12:40]. Thank you for the opportunity to speak to today. I'm a third generation independent community pharmacist. I also consult with pharmacies to help them understand DIR fees. The post adjudication fees that PBMs contractually force upon pharmacies is a condition of accepting tax payer, subsidized Medicare part B business. These fees are documented by CMS have increased by 109000% in the last 10 years. The deliberate structure of these fees means that kindhearted clinician pharmacists regularly lose money on Medicare business to the benefit of those that engage in pure financial Engineering.

Benjamin Jolien:

In my pharmacy, after working with a beloved patient for 10 years, I discovered to dismay that due to these fees, the apparent profit of filling her 393 prescriptions per year was not $2,000 as the claim transmission suggested. But in fact was a loss of $2,000 a year. This was due to a so-called generic effective rate, a PBM financial engineering tactic that I now know far more about than I ever cared to know. In my attempts to continue to serve this patient while making the pharmacy financially sustainable, she became frustrated and left our pharmacy never to return. GER, despite its shield of boringness, has a cost in the destruction of therapeutic pharmacists and patient relationships. Yesterday, I helped a pharmacy owner to demystify these fees in his pharmacy.

Benjamin Jolien:

To his horror, he learned that his own mother's medications were not only being sold at a loss, but he was in fact paying her PBM more in fees than the total revenue for prescriptions in exchange for the privilege of handing over his inventory. This was due to his revenue being based upon a PBM set Mac price and the fee being based on the wildly inflated AWP benchmark price. The world that we

pharmacists practice in today, is a world where economics 101 principles do not apply and abuse market power reigns Supreme. I urge you to move forward with your proposed order and put a stop to these tactics. Thank you.

Lindsay Krisak:

Thank you, Benjamin. Our next speaker is Loretta Bosing. Loretta.

Loretta Bosing:

Protect patients from PBMs. I'm an advocate or activist after my child went into liver transplant rejection after his liquid medication arrived and only a bag on a 100 degree day. Forced away from our trusted hospital pharmacy told by Caremark, we could only use CBS mail order for coverage I investigated for safety. I shared recordings with the NBC FDA drug manufacturers told me to discard my son's meds. The FDA US department of labor said that these are common complaints. The mail order, pharmacy claim, they were using USD guidelines. I found out that was not true. The back of the trucks, mailboxes aren't temperature controlled and reach 120 to 170 degrees.

Loretta Bosing:

No one warns consumers that the FDA and state boards of pharmacy fail to regulate. What would happen to me as a mom if I delayed my child medications that his life relies on every 12 hours or place them in temperatures two times room temperature, knowing that his life will be at risk. Over the past three years, I've shared hundreds of articles about life threatening delays from the same pharmacies, many with the one star rating on the [inaudible 00:15:47] that are business bureau and consumer report sites. Conflicts of interest if called state boards to fail to protect consumers.

Loretta Bosing:

I've connected with independent pharmacists that close their doors due to PBN reimbursements patient's voice that now they must drive further or some have just stopped taking medications. Prior to the pandemic, retail pharmacist said that they're in unsafe working conditions. They can't sleep at night, certain metrics cause them to make a life-threatening error. They [inaudible 00:16:16] has left them with few places to go. I've connected with patients who've received the wrong medications from chains and New York times article reported that CVS was cited with a 21% error due to under-staffing. Patients are forced to use these pharmacies for coverage. FTCS patients like mine and in the past or patients like my son have passed. Please make today the day that you stop filling them, save our pharmacies and save our lives.

Lindsay Krisak:

Thank you, Loretta. Our next speaker is Ashley Sahar. Ashley.

Ashley Sahar:

Hello, thank you for hearing my comments. Madam chair and members of the commission. My name is Ashleys Sahar. I'm an owner of two pharmacies in rural New Mexico, where we've served our community for the last 50 years. Negotiating contracts when I purchased the pharmacies just two years ago was astronomical. There's no telephone calls, it's email only. After an entire year of back and forth I got three ceases and desist letters. Two threats of lawsuits. My patients received multiple letters. Three

letters went out to my patients telling them that they needed to transfer their prescriptions immediately because I was not contracted. That was not true.

Ashley Sahar:

After a whole year of this, they finally gave me good faith of 25 cents instead of the zero, because that's part of what I was fighting in that contract. Only part of it. I ended up having to sign a gag order that had 20 bullet points long, making sure that I was not going to tarnish their reputation any further, just to provide care to my patients. Steering manipulations are out of control. They use false misleading letters. They manipulate patients copays to make us look like the bad guys, to steer them away and into their mail order. They unknowingly request refills from providers, even though it wasn't a refill. I had been filling that script all along and it throws our patients off and confuses our older generations.

Ashley Sahar:

The beyond low reimbursements are out of control at this point. Remember this is negotiated, right? In order to challenge these low reimbursements, you're not allowed to challenge brand names. Even though you submit invoices showing how much it costs, sorry, that's contracted. You're not allowed to challenge anything on part D and Medicaid claims, those are contracted outside. The only ones you can do are commercial claims. Remember this is Mac pricing. So that's all proprietary information is what they claim. You can never really get at what you're, what you're being paid. Not to mention all of the things that are happening in the DIR manual, or excuse me in the provider manuals, these provider manuals, we got notice. Sometimes the only way to play this game is to buy in bulk. Now, according to one of the PMs as-

Lindsay Krisak:

Thank you Ashley. Our next speaker is Matt Siler. Matt.

Matt Siler:

Afternoon commissioners. I'm Matt Siler, general counsel of the National Community Pharmacist Association. NCPA welcomes your vote today and [inaudible 00:19:32] to pursue a six piece study of pharmacy benefit managers. NCPA has been very vocal in our concerns about how PBMs vertically integrated upstream with Aetna, Cigna, United health and the blues and downstream with pharmacies have exploited their data platforms to engage in myriad, unfair methods of competition against pharmacy competitors, which we increased cost of patients. These methods include contract terms that restrict access to patients, massive clawbacks in the form of DIR and GER fees. Patients steering away from community pharmacies, below cost reimbursements and punitive audit practices. We encourage you to vote yes today to study these practices, to bring trans where none currently exists. NCPA represents approximately 19,400 independent community pharmacies. Our members are small business owners who are among America's most accessible healthcare providers. To remain America's most accessible healthcare providers, community pharmacies need competition to be fair.

Matt Siler:

Unfortunately, vertically integrated PBMs use their size and gatekeeper position to tilt the playing field in their favor and harm consumers. We believe the scope of study must include an assessment of uncomfortable nature of PBM contracts. For an example of an uncomfortable contract terms, we urge the commission to look at the American arbitration association decision in the aids healthcare foundation versus CVS Caremark matter where the petition to confirm the award has been filed in the

superior court of Los Angeles. The study should include an analysis of how PBM affiliated pharmacies are treated differently than independent pharmacies in terms of reimbursement audits and clawbacks. The study should also include an examination of patient steering. And for an example, in that regard, please look at the case of Rutland pharmacy versus MVP health. In the US district court, Vermont, where discovery has provided meaningful insight into PBM patient steering practices. Finally, we believe PBMs are pushing a false narrative that their practices support community pharmacies and reduce cost for patients. They do not. This study should put a myth that myth to rest once and for all.

Lindsay Krisak:

Thank you, Matt. Our next speaker is Steve Hoffet, Steve.

Steve Hoffet:

Hello. My name is Dr. Steve Hoffet and I am pharmacist and owner of Magnolia pharmacy in Magnolia, Texas. Last year, my pharmacy and staff provided pharmacy service and COVID vaccines nearly 15,000 patients at our location. Thank you for hearing my story on how PBMs exploit contracts, ignoring performance measures and slash callback fees that dramatically reduce my ability to take of my patients in my community. PBMs have created unattainable and useless performance measures. My pharmacy received five star performance ratings, the highest possible rating for the last five years yet our DIR fees have increased from 2017 of $34,000 to $162,000 in 2021. As an elite performer and even exceeding the metrics of five stars, my callback increased $48,000 last year, and an unbelievable 370000% since 2017. Excelling at a high level and exceeding the industry standard provides no relief to the burden these clawbacks cause operating a community pharmacy and caring for our patients.

Steve Hoffet:

Another shortcoming of the performance measures that they are only focused on things like diabetes, hypertension. Despite narrow focus, the PBMs assess penalties on ingredients costs of high dollar ATIC medications, biologics, and other medications that have no relationship to blood pressure, diabetes or cholesterol. For instance, we filled a $25,000 rheumatoid arthritis medication for a patient in January. The patient picked it up, administered the medic medication. And 11 days after the fact, we had a DIR fee of $2,500 sucked out of our bank account. This resulted in my store losing money on the claim, better stated we were reimbursed less than the cost I paid for the medication. What business can provide a life saving prescription for a patient counsel, explain how to use it and then later have this money stolen from your account. This is only one of the thousands my pharmacy sees every month that fallbacks and DIR fees make it impossible to pay the bills, but also make it where we get dispensed below the price of medications. I urge you to investigate PBMs that threaten my ability to serve my patient and the viability of my pharmacy.

Lindsay Krisak:

Thank you Steve. Our next speaker is David Bottle. David.

David Bottle:

Yes, I'm David Bottle. I used to be the policy director in the bureau of competition. I've submitted written comments, which provides suggestions for this study. By the way, the one thing the study could just start with is the same vertically integrated Pharmacy PBMs impose the same restrictions or the same DIR schemes on their own pharmacies that they do on community pharmacies. That might be a nice place to start. I've been involved in every major PBM investigation that the FTCs done over the last

20 years. I've testified before Congress four times and before 14 state legislatures, primarily for consumer groups, such as consumers, union and families USA. I'm here to answer a simple question who represents the interests of consumers in the pharmaceutical distribution system. It's the community pharmacies, it's there to make sure that the consumer gets the best drug at the lowest possible cost.

David Bottle:

They go toe to toe with the pharmacy, trying to provide that access. And so when PBMs engage in the egregious practices that have been identified to you, consumers lose. Unfortunately, and there's no better example than that than the gagging of Pharmacies that went on for years, that prevented pharmacies from telling consumers where lower price drugs were. The FTC past policy, past enforcement efforts or non enforcement efforts have been severely misguided. They've basically put PBMs in a regulatory free zone. And in fact, besides bringing no enforcement have opposed efforts by states to provide meaningful regulation. I hope that gets reversed. Again my testimony outlines a variety of things for the FTC staff to look at, but ultimately at the end of the day, when a consumer needs the services of their community pharmacies and they're harmed when those pharmacies are being harmed. Thank you.

Lindsay Krisak:

Thank you David. Our next speaker is Miguel Rodriguez. Miguel.

Miguel Rodriguez:

Good afternoon. I'm Miguel Rodriguez, general counsel of American pharmacies, a cooperative of hundreds of independent pharmacies across the country. I urge you to vote to conduct a six piece study of these PBM anti-competitive practices. They harm consume access to affordable medicine. These practices include the following first retroactive clawback fees sometimes called DIR fees. All pharmacies, even pharmacies that consistently achieve CMS's highest rating of five stars have been paying more and more of these fees every year. And the fees are wholly unrelated to the metric that's being measured. For example, even though the metrics may measure diabetes or hypertension adherence, the fee is assessed on all scripts. Even those that have no relationship to diabetes or hyper. And PBMs are also using their considerable market power over the pharmacy benefit market to obtain control of other markets. They use their ability to design pharmacy benefits to steer customers, to the mail order and specialty pharmacies that they own. As a result, the mail order and specialty pharmacies that are owned by the PBMs are among the top five pharmacies in the country.

Miguel Rodriguez:

PBMs often create barriers to competition to protect their mail order and specialty pharmacy businesses. They create the definition of what is a specialty drug in order to require consumers to obtain those drugs only from the specialty pharmacies that PBM owns. They also prevent other pharmacies from dispensing specialty drugs by mandating unnecessary accreditations, even for drugs that have no special administration or handling requirements. Finally PBMs use their market power over pharmacy benefit design to create formularies that require a patient to use a brand drug even where a cheaper generic is available. This gives the PBMs higher manufacturer rebates, but it leaves the patient paying more for the drug. In conclusion, the ability of patients to have access to affordable medicine depends on a thriving and balanced pharmacy market. Urge you to vote, to conduct a six piece study of these and other PBM anti-competitive practices. Thank you.

Lindsay Krisak:

Thank you Miguel. Our next speaker is Julie Carlson. Julie.

Julie Carlson:

Good afternoon. My name is Julie Carlson. I am the associate director for the [inaudible 00:28:39] project at the information technology and innovation foundation. I want to thank the commission for the opportunity to discuss our concerns with the merger guidelines request for information released last month. Like commissioners Phillips and Wilson, we worry about the underlying assumptions in the RFI. In particular, it is troubling that the RFI asks for examples where mergers have harmed competition by making it more difficult for rivals to compete with emerged firm. Because the goal of antitrust enforcement is to protect competition, not competitors. Protecting competitors instead of competition will produce higher prices, lower quality goods, and fewer innovative products for consumers.

Julie Carlson:

Consider the case of musically the short form video app in the summer of 2015, it was the most downloaded free app in the United States. In 2017 TikTok parent company, Bite Dance, acquired musically and merged it into TikTok, which went on to reach a billion monthly active users this past fall. Meanwhile, Meta recently reported losing a million daily active users. Its market capitalization is dropped by close to 300 billion, nearly one third of its value. And it has repeatedly pointed to TikTok as a source of its difficulties. I expect Meta would agree that Bite Dance's acquisition of music made it more difficult for me to compete with TikTok. Yet a merger enforcement

Julie:

Regime that protects competitors instead of competition, would've prevented it. Such a regime would call for enforcers to protect Meta, a company with a market capitalization that has exceeded 1 trillion dollars and deny consumers the benefits of competition from a stronger TikTok, that is better positioned to disrupt social media. I would hope that the agency charged with protecting American consumers would avoid that scenario by continuing to protect competition, not competitors. Thank you.

Speaker 2:

Thank you, Julie. Our next speaker is Bill Keep. Bill?

Bill Keep:

Thank you. And I appreciate the opportunity to speak. I'm a professor of marketing and occasional expert witness for the prosecution or plaintiffs in multi-level marketing cases and author, co-author of numerous academic and nonacademic articles on multi-level marketing, pyramid schemes and business ethics. Marketing messages are best understood in context. The messaging of earnings claims in the multi-level marketing or MLM industry occur within the well known context of high participant churn. In other words, from the selling perspective, the lifetime value of the typical MLM participant is relatively short. As a result, the parent MLM and upline distributors have an economic incentive to convey non-transparent messages regarding distributors earnings to achieve recruitment and retention. The lack of transparency comes in at least four forms. First, the reliance on average earnings obscures, the underlying highly skewed earnings distribution. Second, the unknowable persistence year after year of individuals in top earning positions makes percentages associated with earning categories meaningless.

Bill Keep:

Third, often mention examples of atypical earnings rely the underlying self-interest of upline distributors and the parent MLM, who profit from the required purchasing of recruited and retained distributors and forth the absence of information on typical distributor expenses inflates the perceived earnings, as opposed to the lower post expenses net earnings. Thank you for taking on this important subject.

Speaker 2:

Thank you Bill. Our next speaker is Douglas Brooks. Douglas?

Douglas Brooks:

Thank you. And good afternoon. My name is Douglas Brooks. I am lawyer. I represented victims of deceptive and unfair multilevel marketing companies for about 30 years. I assume that the ANPR, one of the areas will [inaudible 00:32:51] multilevel marketing. Obviously, multilevel marketing is not covered by the franchise rule and it was exempted unwisely, in my view, from the Biz-OP rule. The commission has been trying to decide whether to regulate MLM since, at least, 1995. And I submitted a comment back then, which is as valid today as it was back then, 27 years ago. Deceptive earnings claims are a serious problem as professor Keep just indicated. It is endemic. The industry does not seem to be able to regulate itself. Deceptive, outrageous incredible earnings claims by multilevel marketing companies and their high level distributors go hand in hand with this business.

Douglas Brooks:

I tend to think that is a symptom of the real problem with MLM, which is the compensation plans. The typical MLM compensation plan rewards recruitment at the expense of retailing. And until the commission deals with that problem, you are going to see these deceptive earnings claims. I applaud the commission for dealing with the earnings claims. I hope they will model the rule after the franchise rule and the Biz-OP rule and require companies to give disclosures at least a week before a person signs anything or pays anything. It's important to give people that period of time in order to make a better decision.

Speaker 2:

Thank you, Douglas. Our next speaker is Sheila Arcat. Sheila?

Sheila Arcat:

Good afternoon commissioners. My name is Sheila Arcat. I am a pharmacist and the president and CEO of the national association of specialty pharmacy, a professional association representing the entire spectrum of specialty pharmacy industry stakeholders, including individual specialty pharmacies, specialty drug manufactures, certain PBMs, wholesalers, distributors, patient advocacy organizations, accreditors amongst others. I want to express support and urgency in having the FTC vote to authorize the six piece study on pharmacy benefit managers relationships with affiliated and non-affiliated or independent pharmacies by approving this study, FTC takes a concrete step forward to examine and address the conflicts of interest embedded in the structure of the largest vertically integrated PBMs. The FTC must examine the anti-competitive coercive practices that intentionally restrict patient access to pharmacies by systematically driving specialty pharmacies out of business. These practices include below cost reimbursement with a take it or your out approach. Patients steering to a specialty pharmacy that the PBM owns and predatory terms and conditions that limit pharmacy network participation.

Sheila Arcat:

It is my hope that by undertaking this study and working to understand these practices and their impact, the FTC will agree to establish direct protections to support patient pharmacy access as well as offer recommendations to Congress and federal agencies on where additional statutory and regulatory protections are necessary. Today, the specialty pharmacy market is heavily dominated by the three largest PBMs, as you have heard. These PBMs have more incentive to fill a specialty drugs through their PBM owned specialty pharmacy, limiting patient choice and access in subjecting non-affiliated pharmacies to anti-competitive predatory market practices. The FTC should begin at study by meeting with the pharmacy stakeholders and understand the following: how and what specific terms and conditions are applied by PBMs to intentionally limit pharmacy network participation, including those that have nothing to do with the worker capabilities of a specialty pharmacy, predatory tactics utilized to identify patients who are taking a specialty drug and then notifying these patients that they need to use...

Speaker 2:

Thank you, Sheila.

Sheila Arcat:

Thank you.

Speaker 2:

Our next speaker is Mark Oast. Mark?

Mark Oast:

Hello commission members. My name is mark Oast. I am the co-owner of Eric's RX Shoppe in independent retail pharmacy in Horsham, Pennsylvania. And speaking with you live from the COVID 19 vaccine clinic we are holding at a local high school. The FTC mission statement reads to prevent business practice that are anti-competitive, deceptive, unfair to consumers to enhance, inform consumer choice and public understanding of the competitive process and to accomplish this without unduly burning legitimate business activity. Let's start with anti-competitive. Anti-competitive, the vertical integration that is occurred with three largest PBMs have created an anti-competitive business model. PBMs are supposed to be the go between, between pharmacies, insurers, where reducing patient costs and providing better health outcomes. They do neither. An example of the anti-competitive nature is when a patient comes to fill in prescription at our pharmacy, but we cannot fill this prescription because we're either not in network or it's too expensive.

Mark Oast:

They then go to CVS pharmacy one block away because CVS Caremark, the PBM says their pharmacies [inaudible 00:38:00] for them in less expensive cohort. Deceptive, PBM do not have the word transparent or transparency in the vocabulary. The pharmacy may receive a payment for a prescription today and want to have the bulk of it couped and retroactive fees that should be illegal. The consumers insurance does not know what is actually paid to the pharmacy and PBMs make billions of dollars under spread pricing taxes. In many states, orders have been able to recover millions of tax payer money due to PBM deceptive goods business practices. Unfair, if consumer should be able to go to any pharmacy and fill the prescription without worrying about it, their are network or if they preferred [inaudible

00:38:33]. This is not the case as many PBMs routinely steer patients or worse require patients use a single pharmacy provider that they own for mail with a pharmacy services. The pharmacy practice has destroyed the idea of marketplace competition and restricted patient chase.

Mark Oast:

Additionally, from the pharmacy owner's perspective, we have take it or leave it contracts. We participate in these contracts [inaudible 00:38:53] every brand medication we fill and generic drugs are usually reimbursed a number that is absolutely no correlation to how much a drug costs. These combined make incredibly hard for pharmacy to stay in business. Pharmacy is the only business I know where we cannot control a purchase price from our wholesalers and we definitely have no say in sale price. Inflation is 7.5% over the last 12 months. I can assure you our reimbursements have not increased over the time while all their expenses have gone up. The pharmacy industry needs the FTC to investigate PBMs, to show the enormous anti-competitive market influence. [inaudible 00:39:23]

Speaker 2:

Thank you, Mark. Our next speaker is Dr. Michael Wohlfeiler. Dr. Wohlfeiler?

Dr. Michael Wohlfeiler:

Thank you. I'm Dr. Michael Wohlfeiler. I'm the chief medical officer AIDS healthcare foundation. I've been practicing HIV medicine for over 30 years now. My organization, AHF has been providing advocacy and treatment for people living with HIV and AIDS since beginning of the epidemic. AHF treats a very vulnerable patient population, many of whom struggle with multiple challenges to keep their HIV under control. We still don't have a cure for HIV, but we can manage it with a cocktail of antiviral medications and regular care. People who are adherent to their meds and engaged in care can suppress the HIV and their blood to undetectable levels. Not only does that protect them from many of the life-threatening complications of HIV, it makes them unable to transmit HIV to others. From decades of care, we've learned that it takes an integrated care team to keep people with HIV on track and adherent, especially those who struggle with social determinants like housing or food and security, substance abuse, mental health issues. The healthcare systems that best treat this disease, treat the whole patient.

Dr. Michael Wohlfeiler:

And indeed pharmacists play an especially important role because they have the most frequent contact with the patient, interacting with them monthly, for prescription refills. At AHF, we've created a world class integrated model for caring for people with HIV and our outcomes are exceptional. Our pharmacists are all credentialed experts in HIV. But, over the last decade, PBMs have become an existential threat to innovative, effective models of care like ours and to the health of vulnerable patient populations. Specifically, PBMs dictate whether a patient can stay with a pharmacy because they control the patient's insurance network. And this power became especially abusive when PBM started to merge with health plans and chain pharmacies to set up their own specialty pharmacies. I can tell you that the age of pharmacist is absolutely critical to keeping patients in care and keeping them adherent to their lifesaving medications. The relationship my patients have with their age, a pharmacist is every bit as important as the relationship they have with me.

Dr. Michael Wohlfeiler:

HIV is controlled only if a patient remains on their antiretrovirals and studies have shown that missing meds, even one or two days a month can allow HIV to mutate and become resistant to the medications

used to treat it. I can assure you that no patient ever leaves an AHF pharmacy without their medications, regardless of whether they are able to pay their copay. Certainly the same can't be said for patients forced to fill at CVS or Walgreens. At AHF, we make sure that patients never have interruptions in their HIV medications. I want to echo the concerns that representative Rhodes made at his remarks and on behalf of AHF and the patients we serve, I urge the FTC to investigate PBM abuses. And...

Speaker 2:

Thank you, Dr. Wohlfeiler. Our next speaker is Mark Cuker. Mark? I'm sorry, Mark. I'm going to stop you for a minute. You're still on mute.

Mark Cuker:

I see. I got it. Okay.

Speaker 2:

Thank you.

Mark Cuker:

I'm Mark Cuker, an attorney with Jacobs law group. We represent independent pharmacies fighting the kinds of PBM abuses you've been hearing about. The relationship between PBMs and independent pharmacies is uniquely one sided. Nowhere else does the buyer of a product dictate the sales price to the seller, but that's what happens every time a pharmacist throws in the prescription for an insured. Same PBMs that control what pharmacies are paid also compete with them. CVS, the nation's largest PBM, is also the nation's largest retail pharmacy, uses its power to squeeze smaller competitors and offers to buy them out at a bargain basement price. PBMs operate mail order and specialty pharmacies that compete with independents. They use their power and misuse the pharmacy's confidential information to divert customers to their own captive pharmacies while often providing inferior service at a greater cost to the end payer. PBMs tactic deploying back revenue months after the point of sale is especially destructive.

Mark Cuker:

Imagine running a small business, needing a $15,000 payment to cover rent for payroll only to have it washed out by a random arbitrary and unexplained claw back. I've seen that happen to client after client. When we try to hold PBMs accountable in court, they use oppressive arbitration clauses to evade responsibility. When we sued a PBM and arbitration on the [inaudible 00:44:24] pharmacies, the PBM successfully argued the case should be severed into 26 separate arbitrations. Then it asked for 26 separate arbitrators with each case shrouded in secrecy so, no case could serve as a precedent for any other. We urge the FTC to use its full power to expose and end these practices.

Speaker 2:

Thank you, Mark. Our next speaker is Peter Mats. Peter?

Peter Mats:

Madame chair and members of the commission. My name is Peter mats and I'm director of food and health policy at FMI, the food industry association. On behalf of the food industry and the many thousands of supermarket pharmacies operated by our member companies, FMI strongly supports the

commission moving forward with a six piece study of the PBM industry, including the relationship between large PBMs and pharmacies. PBMs frequently assert that below cost reimbursement is a problem only for poorly run pharmacies and that their low reimbursement rates can create an incentive for such poorly run pharmacies to improve. However, the PBM industry has long resisted attempts to bring transparency that would reveal the basis for these claims and all pharmacies, not just poorly run ones, are suffering as a result of PBMs, take it or leave it contracts and below cost pricing schemes. Even FMI's largest members fortune 500 companies with efficiencies, expertise in supply chain logistics and economies of scale, struggle to operate financially viable pharmacies as a result.

Peter Mats:

Moreover, below cost pricing is just one way that PBMs systemically leverage their market power to the detriment of supermarket pharmacies and other stakeholders throughout the healthcare system. Unlike independent pharmacies, FMI members that operate supermarket pharmacies are not dependent solely on their pharmacy operations for survival. However, while PBM abuses may not force our members to close their doors altogether, they make it very likely that supermarket companies will be forced to continue leaving the pharmacy business, either by outsourcing their pharmacy operations to the biggest players in the market or worse, by abandoning pharmacy operations altogether. Neither of the scenarios as merely hypothetical as several FMI members have gotten out of the pharmacy business in recent years. Supermarket pharmacy closures and abandoned expansions, thus, contribute to the overall trend of decreased access to pharmacies and pharmacy deserts. In conclusion, we respectfully urge the commission to move forward with the proposed study and thank you for the opportunity to provide input on this extremely important topic. If you have any questions about these comments or would like [crosstalk 00:46:58]

Speaker 2:

Thank you, Peter. Our next speaker is Scott Knoer. Scott?

Scott Knoer:

Thank you. I'm Scott Knoer, CEO of the American farmer association. Chair [00:47:07] it's good to see you and the other members of the commission again. I want to thank FDC for your ongoing leadership in shining a light on the large PBMs to expose their uncompetitive contracts in harmful business practices, impacting our nation's pharmacies and our patients. Such a federal study is long overdue and we know that sunlight is the best disinfectant. Anti-competitive PBM practices are putting independent pharmacies out of business and creating pharmacy deserts in minority and underserved communities where the neighborhood pharmacy may be the only healthcare provider for miles. Your section C six B study should ask among other things. One, the payment differences across a variety of factors, relevant to pharmacy practice between PBM affiliated and independent pharmacies. Two, the differences in PBM margin distribution from drug to drug. Three, the degree to which negotiations occur between PBMs and pharmacies during the contracting process and four, the network restrictions placed on affiliated versus non-affiliated pharmacies.

Scott Knoer:

This is just a starting point. We have additional suggestions for questions and welcome the opportunity to discuss this further with you and your staff. What we support the section six B study, we already have mountains of data from medicate and commercial plans on PBM's uncompetitive, and deceptive trade practices that target patients with chronic conditions and force them to use PBN owned pharmacies,

mail order, and regular pharmacies. There's already ample evidence on which to take action. We urge the FTC to use all of your tools to act now to clean up the PBM marketplace by requiring the largest PBMs to divest from their insurer, pharmacy, specialty pharmacy, and provider services to ensure competition in each of these marketplaces, where the top six PBMs handle more than 95% of total US equivalent prescription claims and initiating a rule making to prohibit PBMs from vertically merging with pharmacies downstream. [inaudible 00:49:17]

Speaker 2:

Thank you, Scott. Our next speaker is Peter Michaelson. Peter? Peter, can you hear me? Okay, we'll come back to Peter. Rich Gandhi. Rich?

Rich Gandhi:

Hi, thank you for inviting me to speak with your team. I am here to discuss that a franchising business for the hospitality industry has really become honorous and cumbersome for the franchisees. For example, when a franchisee joins a franchise system, they're often sold on the fact that they will benefit from the group purchasing discount. Unfortunately, that is not the truth. The vendor exclusivity and anti-competitive causes often result in franchisees paying higher cost for goods and services than they would for similar or same products outside the brand. The position that we have is that these pauses should only be used for unique trade items that may be proprietary. They should not be used for the benefit of the franchisors at the expense of their franchisees. They need to have complete transparency for the owner satisfaction and they also need to have anti-competitive price guidance for any vendors.

Rich Gandhi:

Local vendors should be given a priority over overseas vendors. In addition, we also would like to discuss the points plus cash trade practice that the hospitality industry has been engaging in. Basically what that is, is that the franchisor is going to sell points on the internet to basically increase their revenue and reimburse the hotels that are actually housing these customers for a fraction of the cost. The position that we have is that the reimbursement should be at a reasonable rate to cover the cost of operation and the cost of selling the point should not be for profit of the franchiser. All proceeds from the point of sale should be for the property that is actually servicing the guest, not so it's just for the franchisor and then the franchisee who's actually providing the service is losing money on every single transaction.

Rich Gandhi:

We actually would also like to point there that many franchisers act maliciously and they're forcing franchisees into arbitration clauses. So when there's a lawsuit that happens or something along those lines, they're always secret settlements. So there's no change in business practice. This has to change. I would like to thank chairman Connan and her staff to basically discuss this with you at any given time.

Speaker 2:

Thank you, Rich. Our next speaker is Peter Michaelson. Peter, I [inaudible 00:52:21] rejoined.

Peter Michaelson:

This public comment is regarding Annex Brands of San Diego. Annex brands is the franchise for roughly 135 commercial packing and shipping warehouse locations under the names Navis pack and ship, the handle with care packaging stores and pack mail, as well as several parcel store brands. From July 2008

until October 2021 I was the owner operator of Navis pack and ship, Philadelphia. Since as long ago as 2017, Annex has allowed some, but not all commercial franchisees to operate satellite facilities under the false flag of virtual locations. However, these satellite operations are not virtual. They are physical bricks and mortar locations. Rent is paid, operating hours are posted and customers are encouraged to drop off items to be shipped. There is nothing virtual about them. The virtual locations have not been announced to the system, rules and regulations have not been established, franchise purchase fees have not been paid, and they have not been listed in the Annex Brands FDDs or anywhere else.

Peter Michaelson:

These improper arrangements disadvantaged the commercial locations that were not offered the same opportunity to establish a virtual satellite location, and may have also been injured due to sales stolen by a nearby virtual location. Annex brands has for years been in violation of the most essential role of a franchisor to establish and maintain a regulated, equitable, and fully disclosed business environment for its franchisees. Their actions have restricted competition by favoring some franchisees over others. A comprehensive complaint was received yesterday at each of your offices and I encourage you to investigate and pursue these violations by Annex brands and take the appropriate remedial actions. Thank you.

Speaker 2:

Thank you, Peter. Our next speaker is Sandeep Patel. Sandeep?

Sandeep Patel:

Thank you, madam chair and the commissioners for giving me opportunity to speak about my issues. My name is Sandeep Patel, and I'm a second generation of hoteliers who began my journey working at my parents' small motel and moved to Maryland to operate their first small economy franchise hotel in 1993. I operate some hotels out just outside of Washington, DC. And I'm speaking right from my hotel breakfast lobby. In today's world of franchising, we have many unknown fees that franchisees does not know when they sign their franchise agreement. Example is the hidden kickbacks from the items being mandated by the franchisors which are higher than the same item purchased directly from the different sources with the same guidelines and the specs. I'll give you a couple examples. The first example is Comcast's internet service required by IEG, which is built on our franchise monthly bill, and is higher by $200 compared to my independent hotel, in the same time.

Sandeep Patel:

I feel like, as a franchise or purchasing power, the price for this good should be lower than what I can pay for one of my own hotel down the street. The second, the breakfast mandates, which includes and other hotel supplies as well, which are very expensive items, which must be purchased through their mandated vendors, which is priced up due to the kickbacks. Given back to the franchisors, the same breakfast item by the company and spec is cheaper at our local wholesale warehouse stores down the street from my hotels. If we do not purchase these items to mandated vendors, then the franchisees like me are penalized for mandating. These are very small examples, which we all have to go through as a hoteliers, that are adding costs and operations that we do not calculate when we sign up for these franchise agreements. And I want to thank you for your time. And I encourage this commission to dive deep into this mandated supplier issue from the franchiser to make money off of their franchisees that were not disclosed when we signed this franchise agreement. Again, thank you for your time and please [inaudible 00:56:41]

Speaker 2:

Thank you, Sandeep. Our next speaker is Henry Ranger. Henry?

Henry Ranger:

Yes. I want to just start by thanking FTC for just listening to all the pharmacists here. I mean, I can go on and say the same stuff that they've been saying in terms of shooting out all the different numbers and people know that competition doesn't exist or even come close to existing. But one thing, I just want to humanize it a little bit, cause again, I could just say the same things over and over that we've already heard. But, if there's one good thing that came out of the pandemic, it was just shining a light on the independent pharmacies. Why do we think West Virginia did so well when it came to vaccination rates? It was because the independent pharmacies were the first to get the vaccine. They put on full exhibition just how vital the independent pharmacies are to the nation.

Henry Ranger:

And if PBMs continue at this rate in which they've been conducting these corrupt practices, the independent pharmacies aren't going to last. My wife and I are both pharmacists. We started a pharmacy from complete scratch and we've done well. And it's unfortunate, as a business owner, to be doing well, to be getting accolades, to be winning awards, to still potentially not survive because our hands are tied when it comes to reimbursements. I mean, there's no other business, to my knowledge, where you can provide a service or good and get paid and get reimbursed less than what you pay for the truck. It just seems like it's a common sense thing and that again, if you just take the time to investigate it, which prayerfully things work out and you guys agreed to do so. If you see that, I think it'll be painfully obvious just how corrupt things have been. And again, who knows what the state of the nation would be if the independent pharmacies weren't around to lead the way with COVID-19, just movement in terms of how we took care.

Henry Ranger:

So again, thank you.

Speaker 2:

Thank you, Henry. Our next speaker is Greg Ribald. Greg?

Greg Ribald:

Yes. Good afternoon, Madam chair. And thank you so much for the opportunity you to offer comment. My name is Greg Ribald and I'm proud to represent American pharmacy cooperative, made up of over 1700 community pharmacies in 30 states. Also proud to be speaking here with this illustrious group of provider, pharmacy and patient advocates and oncology advocates. In light of the FTCs twin mission of protecting consumers and protecting competition, there could not be a more important use of this agency's time, resources and expertise than investigating the practices of large PBMs and their affiliate insurers and their affiliate pharmacies. Simply put, PBMs at their worst, take a sledge hammer to patients, to patient access to care and a sledge hammer to competition. Whether it's manipulating drug pricing, engaging in exclusionary rebate practices, inflating drug costs at the counter for part D patients, and then clawing that money back to on their pockets or steering some of this nation's sickest patients, including those with cancer and HIV, to PBM affiliate pharmacies

Greg Ribald:

Pharmacies against those patients wills. These practices restrict access to care, they compromise care and they limit patient choice while really driving up costs for patients and for taxpayers. Finally as you begin the investigatory process, I would just urge you to steal your resolve and this agency resolve because you're going to be delving into practices of some of the largest companies in the world that are engaging in some of the most unpaid, opaque, and complex pricing and steering schemes that likely this agency has ever seen and that's saying something. And they're going to resist with all of their strength and influence that they can master, whether it be legal, whether it be the halls of congress, they will resist. Pharmacy and patient advocates at the state level who've been on their bicycles chasing these practices for years and they resisted every turn. Prescription drug pricing affects the life of almost every American. And there's no greater undertaking this agency can begin no matter how difficult-

Lindsey:

Thank you, Greg.

Greg Ribald:

Thank you.

Lindsey:

Our next speaker is Heidi Romero. Heidi.

Heidi Romero:

Thank you for allowing me to address my concerns. I'm a third generation pharmacist at my family's independent pharmacy in rural West Virginia. We've served our community since 1892, but due to the exponential growth of DIR fees over the last several years, it has been a struggle just to remain in business. The unattainable metrics set by the PBMs place the financial burden with no reduction in fees available. Metrics are not based on successful outcomes for individual patients but rather on percentages. The claw backs are often assessed months after the patient even receive their medications so any positive change I make today for that patient will not be recognized for several months if I'm able to stay in business that long. To my knowledge, no other business industry has a reimbursement model such as this. To make it a little bit more easily understood I'd like to provide an example of by applying DIR practices to another industry with a restaurant serving in place of the pharmacy and the industry serving in place of the PBM. Six months after my customers have eaten at my restaurant, I'm notified by the industry that we did not cook our steaks nor our fries to their standard.

Heidi Romero:

I am then assessed a 10% non-negotiable fee for all sales regardless of how successfully we satisfied and met the individual needs of our patrons. That fee is then applied to all meals served regardless of whether or not a person even ordered steak or fries making the total reimbursement of my services below what it even cost me to order the food I serve. Not one dime of that money taken back goes to lower the cost of the meals order to improve the services provided to individual patrons, nor can I use it to hire more skilled staff to better serve our customer base. This is exactly what happens in pharmacy practice and hinders effective and individualized patient care that independent pharmacies provide. I humbly employ you to consider conducting an independent review of the negative impact of DIR fees

rather than one performed by the PBMs themselves to avoid a potentially biased and skewed review. Thank you very much for taking the time to listen to me.

Lindsey:

Thank you, Heidi. Our next speaker is Ted Okon. Ted.

Ted Okon:

Thank you madam chair and commissioners. I am Ted Okon, executive director of the Community and Oncology Alliance a nonprofit organization representing community oncology practices in patients they serve. This morning we released a new report providing the most detailed compilation to date of abusive and anti-competitive PBM tactics. The report pharmacy benefit manager expose how PBMs adversely impact cancer care while profiting at the expensive patients, providers, employers, and taxpayers. Provides a comprehensive expose and legal analysis of the most pervasive and abusive PBM tactics. Highlighting the adverse impact they have on patients, providers, and healthcare payers including Medicare, Medicaid, employers, and taxpayers. The goal is for the report to serve as an authoritative reference for policymakers, regulators, employers, and other seeking greater understanding of PBM behavior, while also suggesting solutions to reshape the healthcare industry for the better. The report sheds light on how a few vertically integrated Bahamas control 80 plus percent of prescription drugs in America, including the power to not only dictate drug costs but also which drugs especially trained physicians can provide to their patients. Over the last few years, nearly all the major PBMs have become [inaudible 01:04:23] integrated owning, or being owned by the nation's largest health insurers.

Ted Okon:

The growing PBM oligopoly has littered the healthcare landscape with a dizzying array of costs and restrictions that limited patient access to prescribed medications putting independent provider, pharmacy providers out of business and exacerbated the spiraling cost prescription drugs at PBM falsely served a curb. It is imperative that the FTC act to stop this dangerous PBM and insurer oligopoly while hopefully Congress does something meaningful to protect cancer patients and other Americans from PBMs. Lives are literally at state. The report I reference can be accessed at communityoncology.org. And again, thank you for the opportunity to speak today.

Lindsey:

Thank you, Ted. Our next speaker is Clint Hopkins. Clint.

Clint Hopkins:

Hi, I'm Dr. Clint Hopkins, a pharmacist and owner of Pucci's Pharmacy. Independently owned in Sacramento, California, since 1930. PBMs now dominate not only the pharmacy market but also the healthcare market at large. They may own the insurance company, make the contract that sets our rates, the switch that processes our claims, the store down the street, and the mail order pharmacy to which they steer my patients. Contracts with PBMs are not negotiable. We are beholden to whatever contracts and policies they put forth. Pharmacies do not get any say in the rates and fees or fees when we have tried to negotiate for fair reimbursement from these entities in the past, our requests were denied. These are take it or leave it contracts, forcing community pharmacies to turn patients away from medications they would prefer to get from a local pharmacist than from their mail carrier. For the prescriptions that we do dispense, PBMs claw back funds on those claims in the form of D-I-R-B-E-R or

G-E-R fees weeks or months after the sale. These fees are unpredictable and unprecedented in any other industry. PBMs negotiate the medications that are on their formularies often choosing a medication that may cost the patient or the pharmacy more to dispense but the PBM prefers this more expensive medication because they get a more favorable manufacturer rebate.

Clint Hopkins:

This high cost pay to play strategy has resulted in skyrocketing costs of brand new medications over the last decade making brand name medications unaffordable to many patients and causing patients on Medicare part D plans to go through their coverage phases faster and faster each year. Ultimately this costs all taxpayers more as Medicare is taxpayer funded healthcare. Those rebates are not shared with the pharmacies or patients who paid more upfront they are retained by PBMs as profits. For far too long, PBMs have operated in the shadows extracting exorbitant amounts of money from pharmacies and consumers across the nation. Now is the time for the FTC to conduct this study, to reign in these behemoths, and break up these monopolies to save healthcare in America. Thank you.

Lindsey:

Thank you, Clint. Our next speaker is Monique Whitney. Monique.

Speaker 3:

Thank you, madam commissioner and members of the commission. My name is Monique Whitney and I am the executive director of Pharmacists United for Truth and Transparency or PUTT. PUTT is a nonprofit pharmacy and patient advocacy organization. We collect the stories and evidence from pharmacies and their patients about PBM abuse which we then use to help educate the public, the media, and government officials. For us, it's the daily experience of hearing stories and being incredibly shocked and then thinking, "Wow, how could what we're hearing be happening in the 21st century and particularly in our country where we say that small business is the backbone of the economy." We support the proposed study.

Speaker 3:

It's important to understand the degree to which these healthcare mega corporations or violating the basic rights of providers, patients, and health plan sponsors, which are typically the patient's employer or the state or federal government. Violations and practices that need to be examined, and these are just a very few include take it or leave the contracts with providers that favor the PBM, PBM self dealing and steering especially with expensive specialty medications, the true purpose of tiered and preferred provider networks, charging providers fees for everyday acts of business like claims submission, and then the true nature of staffing and profitability at PBM owned pharmacies especially because we're hearing so much about under staffing at dangerous levels and that patients lives are potentially in danger.

Speaker 3:

Again, these are just a very few of the practices that need to be examined for antitrust and also for creating barriers to entry for other providers and obstructing competition of which we have plenty of evidence to share. PBM say they conduct these practices in the name of saving employers' money, but because there's a lack of transparency, there's no evidence of anything except these mega corporations climbing over each other in the ranks of the fortune 10. So with that I will say thank you. We are extremely grateful for your attention and we hope you do the study and we look forward to the results.

Lindsey:

Thank you, Monique. Our final speaker is Teresa Dickinson. Teresa.

Teresa Dickinson:

Thank you, madam chair and members of the commission. I am Teresa, an independent pharmacy owner in the Western United States. I ecstatically support the federal trade commission study of pharmacy benefit managers. I have been dealing with unfair business practices from PBMs since I opened my pharmacy in the early two thousands. Every year, I told myself it couldn't get worse and every year it did. I practically have to sell my left kidney to get a copy of my own contract. In order to have patients I have to enter in to take it or leave the contracts where then my patients get steered from me to the PBMs own retail or mail order pharmacies. The Medicare patients I am able to keep, I get exorbitant fees on. In my well-performing pharmacy, I had $200,000 in DIR fees in 2020, which put my business profit at a negative.

Teresa Dickinson:

I regularly have $200 plus losses monthly on some of my HIV patients and this is even before the DIR fees. I encourage you to investigate then take it or leave it contracts, the patient steering, the max slash GR pricing or whatever term they want to call it to avoid legislation. The claw backs, the many types of fees, how much they reimburse themselves versus their competition, and how they use my own data to market for themselves. I encourage you to also look at their spread pricing practices, their rebates, their misleading to employers on savings and prescription spending, and their repackaging at mail order to allow themselves to bill higher prices. Their appalling business practices have gone on too long without oversight. I beg you, please level the plain field so independent pharmacies can survive. Thank you.

Lindsey:

Thank you Teresa. And thank you to all of today's speakers. I will now turn the meeting back over to chair Khan.

Lina Khan:

Thanks so much Lindsey, and thanks so much to each of our public speakers for your extremely informative and heartfelt remarks. And apologies for the various tech issues that I've been having throughout this meeting and many thanks to the FTC team for all the real time assistance. So we will now turn to the first item on today's agenda, a proposal to publish an advanced notice, a proposed rule making to address deceptive earnings claims. The proposed notice seeks public comment to help the commission craft a rule that bars misleading earnings claims. False earnings claims routinely mislead Americans into investing thousands of dollars into opportunities that turn out to be a sham. Be it misleading claims about multilevel marketing schemes that lure in aspiring entrepreneurs, false marketing from for-profit schools targeted hopeful students, or deceptive representation from gig platforms that draw workers. The cost of these false claims can be devastating, losing people money and time and saddling them with debt.

Lina Khan:

The economic precarity spurred for many by the pandemic has further created an environment right for these tactics where fraudsters can use false claims to prey on Americans seeking additional income or a new job. These tactics can also harm law abiding businesses who may lose out to rivals that are winning

customers through deceptive claims. To ensure that we're doing all that we can to protect Americans from these scams, we must create rules that prohibit these practices and make it possible to obtain monetary relief for the consumers harm by these fraudulent practices. I appreciate staff's outstanding efforts to protect Americans from deceptive earnings claims and their efforts to prepare the advanced notice of proposed rule making before the commission today. We're lucky to have Melissa Dickey from our bureau of consumer protections division of marketing practices to share a presentation on the background for staff's recommendation. Welcome Melissa. I will now turn it over to you.

Melissa Dickey:

Thank you, chair Khan and commissioner Phillips, Slaughter and Wilson for your consideration of the recommendation to explore a rule making proceeding to protect consumers from bad actors making deceptive earnings claims. I appreciate the opportunity to appear before you today and to present on this issue. Deceptive earnings claims are an immense source of consumer harm. Lies about income thrive on the entrepreneurial spirit of people struggling to make ends meet, trying to improve their lives, or saving for retirement. Scammers tell people they can make a lot of money if they make a payment or investment, join a program or pay for coaching, or start a new job or business. Relying on these assurances, consumers invest money and spend their time trying to earn the promised amount of income. Too late, they realize they have been misled often leaving them deeply in debt.

Melissa Dickey:

Based on our law enforcement experience, we believe that this problem is widespread and impacts every community. Scammers have capitalized on people losing their jobs or needing to find a way to work from home during the COVID 19 pandemic. Specific communities like older consumers, Latinos, black Americans, veterans, students, and others have been targeted by bad actors. We have seen such dishonest recruiting by gig companies and employers, companies using promises of big profits to lower consumers into spending money on their products, investment schemes offering so-called guaranteed returns, coaching scams seeking to take advantage of people looking for different ways to earn money, and many other deceptive ventures promising big returns, financial freedom, or proven ways to earn money. Consumers report high losses from deceptive earnings claims. For example, a December 2020 FTC data spotlight on income scams noted that consumers told the FTC that they had lost more than $610 million between 2016 and 2020. And we know that those losses are only the tip of the iceberg. Research shows that the vast majority of people who experience fraud don't report it to the FTC.

Melissa Dickey:

Going back as far as the 1930's, the commission has brought many enforcement actions against companies that make deceptive earnings claims, including actions against coaching or mentoring schemes, multi-level marketing companies, work from home, e-commerce, or other business opportunity scams, chain referral schemes, gig companies and employers, job scams, and businesses purporting to offer educational opportunities. This includes more than 129 lawsuits filed since 2000. Through these lawsuits, the FTC has collected more than $530 million for redress to consumers, but our ability to achieve similar results in future cases has been impaired by the Supreme court's recent decision AMG. While the commission may still be able to obtain redress for people where the business opportunity rule, franchise rule, or telemarketing sales rule are applicable, numerous deceptive earnings schemes fall outside of the scope of these rules. Here are some examples. In FTC versus Advocate, one of the commission's allegations was that Advocate, a multi-level marketing company, deceiving consumers and to believing they could earn significant income if they joined its business opportunity.

Melissa Dickey:

According to the FTCs complaint, disclaim was false. Like most MLM participants, the vast majority of advocated distributors earned little to no money. For example, the FTC alleged that in 2016, 72.3% of distributors did not earn any compensation from Advocare and another 18% earned between one cent and $250, and 6% earned between $250 and $1,000. The FTC reached a settlement with most of the advocate defendants, which required Advocare to pay $150 million in equitable monetary relief to consumers. In another example, in 2016 the FTC filed sue against for-profit school DeVry University and its parent company. The FTC alleged that DeVry falsely claimed that its graduates had 15% higher income one year after graduation on average and the graduates of all other colleges or university. The FTC was able to settle this lawsuit, obtaining significant financial release for tens of thousands of students allegedly harmed by DeVry's conduct.

Melissa Dickey:

The school agreed to pay $49.4 million in partial refunds to some students and 56, I'm sorry, $50.6 million in debt relief to others. Another example is the FTCs action against MOBE, a massive internet business coaching scheme. The FTC alleged that the MOBE defendants falsely told prospective members that their business education program contained a so-called proven 21 steps system for making substantial sums of money quickly and easily. In actuality, most people who bought into the program never made a substantial amount of money or any money at all the FTC alleged. Instead, according to the FTC, many experienced crippling losses or mounting debts including some who lost more than $20,000. The FTCs action halted MOBEs deceptive scheme and to date, the FTC has collected more than $20 million to return to impacted consumers.

Melissa Dickey:

These are only some of the examples of the types of cases where that Supreme court's ruling and AMG would impede the agency's ability to return money to injured consumers. In conclusion, staff is recommending that the commission issue an advanced notice of proposed rule making concerning deceptive earnings claims. We are hopeful that the recommended rule making will provide the commission with new tools to enable the agency to continue our mission of stopping wrongdoers and helping injured consumers. Finally, for people interested in learning more about common scams pitching opportunities to make money and how to avoid them, visit consumer.ftc.gov. Thank you, chair Khan and commissioners Phillips, Slaughter, and Wilson for the opportunity to present on this matter today.

Lina Khan:

Thanks so much for the terrific presentation, Melissa. I want to specially thank you and the division of marketing practices for your tremendous work on this effort, which fills on a long history of important cases that BCP has brought. I also specifically want to give a big thanks to Andrew Hudson, Kenny Wright, Jason Adler, Guy Ward, David Gibbons, Douglas Smith, and [inaudible 01:20:09] for their contributions to this project. I'll share in brief that I strongly support this recommendation. The commission has well established legal authority to challenge deceptive earnings claims under section five of the FTC act. As Melissa noted, since 2000, the FTC has brought over 129 enforcement actions against a wide array of companies making deceptive earnings claims collecting more than $530 million in redress for Americans. The FTCs enforcement work has highlighted the heavy cost of false earnings claims. One area where these deceptive earnings claims can hit especially hard is in the gig economy where information and power asymmetries between platform companies and their workers can be especially ripe for abuse.

Lina Khan:

For example, in 2017, the FTC found that Uber had been exaggerating the yearly and hourly income that drivers could earn. Uber ultimately agreed to pay $20 million to resolve these charges. The entirety of which went towards providing refunds to harm drivers. Last year, the agency also took action against Amazon for deceiving drivers who deliver packages through Amazon flex. Despite claiming that drivers would receive a 100% of the tips that they earned, Amazon pocketed over $60 million in tips that rightfully belonged to over 140,000 drivers. Amazon settled with the FTC agreeing to turn over the full amount of the wrongly withheld tips for redress for the affected drivers. Evidence suggests that gig workers are disproportionately likely to be people of color, immigrants, or from other marginalized groups. Communities already reeling from the effects of the deadly pandemic. I'm also concerned by how false claims can aid firms in amassing market power and locking in users and how that market in turn may also enable deceptive claims.

Lina Khan:

In the commission's prior actions, the money won back will harm consumers generally relied on our 13B authority, a path that is no longer available to the FTC after the Supreme court's decision in AMG. In the wake of this loss, the commission has been identifying additional ways that it can use to broader toolkit and authorities to secure redress and penalties against law breakers. For example, in October 2021, the commission put more than 1,100 businesses on notice. Reminding them that making misleading money making claims as established in case precedent could lead to significant civil penalties. Codifying a rule. Like the one that we proposed today will enable us to return money to injured consumers in future cases like these ones. While legislative fix to section 13B remains a key priority for the agency, a potential rule against misleading earning slaves will enable us to return money to injured consumers when they've been harmed by small fraudsters and dominant firms alike. I strongly support staff recommendation to initiate this rule making. With that, I'm going to make the following motion. I move that the commission approve and publish in the federal register the advanced noticed a proposed rulemaking for a trade regulation rule on earnings claims that was circulated by the secretary under matter number R111003 on February 14th, 2022. Is there a second?

Noah Phillips:

I second.

Rebecca Slaughter:

[inaudible 01:23:15] Two seconds.

Lina Khan:

Thank you. I will now turn into my fellow commissioners to share any remarks before this item is moved for a vote. Commissioner Phillips.

Speaker 4:

Commissioner. You are on mute.

Noah Phillips:

I'm sorry. Can you hear me now?

Lina Khan:

Okay. We can hear you. Yes.

Noah Phillips:

You're not the only one madam chair having IT issues. Thank you for that and my apologies for speaking over a Commissioner Slaughter for the second. And thanks also to Melissa for that great presentation. I won't go through every name of the team members that the chair mentioned but thanks to all of you and also Katie Daffan and Alyssa Gelsen for all of your excellent work on this advanced notice of proposal making. Thanks also to the chair for docketing this ANPR. For decades, our division of marketing practices has done important work to protect consumers from deceptive earnings claims made by companies, including multi-level marketing companies or MLMs. MLMs often recruit down line participants by describing opportunities to earn. And so companies must be careful to ensure that they have a reasonable basis for any claims they make. Too often, we have seen MLMs induce consumers to join with deceptive promises of a wealthy lifestyle or high incomes limited only by a consumers own efforts.

Noah Phillips:

The problem does not show signs of waning anytime soon. At the beginning of the pandemic, the FTC sent warning letters to nearly two dozen MLMs that appeared to be making deceptive earnings claims. These companies were attempting to capitalize on Americans COVID fears by making claims that consumers could earn significant amounts of money while working safely from home. As we saw in cases like Advocare which Melissa described, these deceptive claims often end up costing consumers significant amounts of money. Since the Supreme court handed down its AMG decision, it has become harder for us to give consumers back money stolen from them. Given the substantial harm cause by deceptive earnings claims, I support the effort to use section 18 of the FTC act to promulgate a clear rule tailored to address this clearly unfair and deceptive conduct and allow us to get consumers their money and obtain civil penalties. As I said at our December open meeting where we approve the issuance of an impersonator ANPR, the ANPR is just the first step in a lengthy rule making process, but it is a crucial one. The commission needs to hear from the public. And so I encourage all interested stakeholders to submit comments that will help us determine if a rule is the next best step and if so, what the contours of that rule should be. Thank you, Madam chair.

Lina Khan:

Thanks so much Commissioner Phillips. Commissioner Slaughter.

Rebecca Slaughter:

Thank you so much, Madam chair. And thank you to Melissa for that excellent presentation. As you heard from Commissioner Phillips and from the chair, unfair and deceptive earnings claims underpins some of the worst and most financially ruinous scams Americans face. Pyramid schemes, phony investments, and multi-level marketing all exploit people's hopes for financial stability, for a chance to improve their lives with false promises. These scammers often take advantage of national and financial crises to exploit the newly vulnerable. And unfortunately, we've seen that in the COVID-19 pandemic as well. The extent of these scams is astounding. In a 2020 law enforcement crackdown the FTC pursued over a billion dollars lost to these schemes. Combating these schemes illuminate something important about the agency's authority and our mission too. Section five's requirement that earnings claims are

honest and substantiated reflects an underappreciated obligation of the FTC to protect Americans as workers and not simply as the end consumers of products and services.

Rebecca Slaughter:

Markets cannot function effectively without honest and transparent pricing. That is just as true for the labor market as it is for consumer goods. False or misleading earnings claims rob people of their investments, their time, and the fair value of their labor. It's also worth remembering, individuals who put their savings into securities largely wealthier individuals, can rely on the SEC to police misrepresentations about earnings claims with respect to those investments. But less wealthy folks who may pour their life savings into promised business opportunities deserve the protection of the federal government as well. That is why we must aggressively police [inaudible 01:28:21] demonstrate how this kind of exploitation works in practice. Last year the FTC settled with the owners and operators of [inaudible 01:28:28]. The company primarily targeted Latinas with Spanish language ads that made false promises of significant earnings reselling luxury products. [inaudible 01:28:37] marketing campaign specifically targeted Latina customers interested in starting work at home businesses.

Rebecca Slaughter:

It seems like none of women targeted in the scheme made money, but were instead cheated out of their time and funds to buy useless goods. These kinds of false claims crowd out honest opportunities for people to start businesses, making life even more precarious for vulnerable workers and would be entrepreneurs. I'm also deeply concerned about the effect the over promises of the gig economy have on workers in the labor market. Last year the FTC settled with Amazon over our charges that it robbed its Amazon flex drivers the full amount of tips promised to them. These gig economy workers signed up as drivers to deliver goods and groceries, grocery orders, through Amazon based on an advertised hourly rate and the promise of receiving a hundred percent of tips they earned while completing deliveries. After people had already signed up to work for the company, Amazon secretly changed its payment scheme and ceased giving drivers their tips while still representing that it did so to these workers and to consumers. In settlement, the agency recovered $61.7 million from Amazon, the full amount of the tips that agency believe that Amazon withheld from them. By misrepresenting these drivers take home pay, Amazon distorted both the gate driver labor market and consumer home delivery market in what I believe we can fairly

Rebecca Slaughter:

Barely surmised was an unlawful bid to increase its market share and lower its labor costs. Effective enforcement of section five's consumer protection obligations helps make these markets for labor functional, fair, and competitive. That's why I'm eager to begin a rule making inquiry on earnings claims. I'm proud of the decades of enforcement actions the agency is under taken to protect against these unfair and deceptive practices. But case by case enforcement has left gaps and scrupulous actors can exploit. Starting this inquiry means we can now gather evidence on how best to protect against these scams and begin to think about how a possible trade regulation rule could help level the playing field between workers and those that employ them.

Rebecca Slaughter:

Pursuing world violations would also reopen an avenue to return stolen money to consumers, something we can no longer do under section 13B until Congress steps into fix it. Finally, I want to thank everyone that helped bring this ANPRM to the commission today in particular, Melissa Dickey and

Hudson and Katie Doughin and in the division of marketing practices, and also like to thank Lisa Gelsen, the council to the director for the bureau, Kenny Wright in the office of the general counsel, Jason Adler and Guy Ward from the Midwest regional office, David Gibbons, Douglas Smith, and [inaudible 01:31:13] Lao and the bureau of economics for all their hard work. And you met him chair for putting this issue before the commission today. Thanks very much.

Lina Khan:

Thanks so much, Commissioner Slaughter. Commissioner Wilson.

Commissioner Wilson:

Thank you, Madam chair. And thank you also to Melissa Dickey for her excellent and informative presentation. And thanks also to all of the staff that Commissioner Slaughter just identified. In the interest of time, I will not go through the list again, but my thanks to everyone. I remain skeptical of unleashing a tsunami of rule makings to address, comment unfair or deceptive act practices. But I do not oppose seeking comment on today's ANPRM for three reasons.

Commissioner Wilson:

First as others have noted, we do contemplate this rule against the backdrop of AMG. The Supreme court's recent decision limits, the commission's authority to use section 13B of the FTC Act to obtain monetary relief for consumers harmed by misleading earnings claims. A rule would not prevent fraudsters from engaging in deceptive earnings claims, but it would enhance the FTCs ability to strip them of their ill gotten gains and return that money to consumers.

Commissioner Wilson:

But for AMG, I would be skeptical about the need for rules regarding conduct frequently targeted by the FTCs expensive fraud program, that said a 13B fix would be preferable to having the FTC pursue a cornucopia of rules. And if a 13B fix is enacted during the dependency of this rule making, I likely would ask the commission to terminate the process. Second, whether false earnings claims are made by frauds or legitimate businesses, no benefit accrues to consumers or competition. In fact, a 2020 FTC data spotlight about income scams stated that the median loss associated with business and work at home opportunities is $3,000 and losses for consumers related to deceptively marketed investment seminars are higher exceeding $16,000. And Melissa discussed these costs and these harms more extensively, but even in the face of decades of aggressive enforcement and extensive consumer and cation business education efforts, deceptive earnings claims persist.

Commissioner Wilson:

Third, consumers cannot analyze the costs and benefits of investing significant resource to pursue these opportunities without accurate representations from sellers, but the true value of these opportunities is best assessed by the entities offering them. And as a couple of our commenters described, we see significant information asymmetries between consumers and the entities that make earning claim. The monetary value of an opportunity is likely the central material claim that consumers consider before spending hundreds, thousands, or even tens of thousands of dollars on financial improvement opportunities. This ANPRM seeks information on how to ensure that when disclosures are made regarding earnings, they are substantiated. And for these reasons I do not oppose an ANPRM that explores ways to incentivize establishing a reasonable basis for earnings claims. Thank you, Madam chair.

Lina Khan:

Thanks, Commissioner Wilson. So the motion having been seconded, I will call for a vote. Commissioner Wilson.

Commissioner Wilson:

Yes.

Lina Khan:

Commissioner Slaughter.

Rebecca Slaughter:

Yes.

Lina Khan:

Commissioner Phillips.

Noah Phillips:

Yes.

Lina Khan:

And I vote, yes. The motion passes by unanimously. As we move forward with this rule making effort, I will really look forward to comments and engagement from the public, which we will be seeking as part of our process. Well now to turn to our next agenda item, the use of the commission's investigative authority under section 6B of the FTC Act to issue orders to large pharmacy benefit managers, to study a range of their commercial practices, to give us better insight into their drug pricing practices and their contracts with pharmacies, including for the purpose of examining whether those contracts negatively impact independent or unaffiliated pharmacies over recent decades, we've witnessed two trends in particular in the drug prescription sector. On the one hand, patients pay ever higher prices for drugs, including those needed for survival.

Lina Khan:

As we've heard across our meetings from our public commenters, these price increases have impacted both the insured as well as the uninsured or underinsured, who is captive customers are forced to ration or even completely forego vital medicines. We've also seen a troubling trend in the drug retailing and fulfillment sectors where small, local and family owned pharmacies, the backbone of so many communities across the nation have been closing shops and vanishing at a high rate. This trend is especially concerning because these types of community institutions have at times proven themselves to be superior at delivering for their patients and customers.

Lina Khan:

For example, as one of our commentators mentioned during the early months of the COVID 19 vaccine rollout, community pharmacies in some cases proved to be more nimble, agile and efficient than their large chain counterparts in getting Americans vaccinated with states like West Virginia, quickly vaccinating the elderly and those in need. Pharmacy benefit managers, companies that manage

prescription drug benefits on behalf of private health insurers, Medicare plans employers and other payers have in recent decades vertically integrated with affiliated health insurance companies in retail and specialty pharmacies, potentially creating financial incentives for them to steer patients towards affiliated services.

Lina Khan:

For the last several years, independent pharmacies and other stakeholders across the drug supply chain have claimed that these vertically integrated PBMs play a major role in increased cost of drugs to patients and in the gradual elimination of independent pharmacies from the market, in particular, these stakeholders point to practices such as the charging of after the fact direct and indirect remuneration and related fees, as well as complicated and opaque pricing terms that may allow PBMs to reimburse independent pharmacies less than the cost of acquiring medicines.

Lina Khan:

They have also indicated that vertically integrated PBMs may deploy pharmacy network terms that allow those PBMs to claw back patient co-pays and deductibles and implement gag clauses, audit provisions, and other terms that squeeze independent and unaffiliated chain pharmacies and result in a windfall for these PBMs.

Lina Khan:

Stakeholders have also surfaced a growing concern with the impact of PBM rebates and other fees applied by drug manufacturers and their negotiations with PBMs that may increase patients prices at the pharmacy counter. They have pointed out that patients usually have to pay co-pays, deductibles and co-insurance based on the gross drug prices as if no discount has been applied to the actual price of the drug through rebates that are shared with PBMs and payers. In other words, while PBMs may a benefit from negotiating these rebates, it is maybe unclear whether patients who ultimately need to buy the medicines fully benefit from these reduced prices.

Lina Khan:

We've heard numerous complaints about the price of insulin in particular. And some commentators have suggested that the price and associated co-pays of insulin and other drugs may be artificially inflated due to these PBM rebate practices. We've also received complaints that PBMs and pharmacy plans may face incentives to drive patients to more expensive drugs that come with rebates instead of the more affordable drugs that are available.

Lina Khan:

Complaints about these problematic incentives have only grown worse with the rise of high deductible health plans and the increasing use of expensive biologics. Additionally, individuals have pointed out that patients have less choice of pharmacies and drug products than ever before as PBMs may increasingly rely on restricted formularies and dispensing options. Recent studies conducted by both chambers of Congress have confirmed some of these claims, finding that these large vertically integrated PBMs may play an outsized role in driving up drug prices and lessening competition among drug stores and pharmacies.

Lina Khan:

These studies are coupled with hundreds of complaints that the commission has received in our public docket and during our commission meetings from patients and agreed pharmacists alike. Therefore, and despite the agency's limited resources, I believe it is vital to launch this study. We have an imperative to better understand and ultimately tackle anti-competitive conduct that may be contributing to sky high drug price and the decline of independent pharmacies and better grasping the role of PBMs is a key part of this work.

Lina Khan:

The FTC has a long history of pursuing market studies to deepen our understanding of economic conditions and business conduct, including a PBM study that Congress required the commission to conduct in 2005. Much has changed in the industry since that first study was conducted. Therefore, I believe that we should direct our efforts at updating our understanding of this industry and scrutinizing the practices that many have suggested maybe culprit. In addition to the orders the commission would send out to the large vertically integrated PBMs, I would also seek voluntary comments from the public for their views on how these PBMs may be affecting drug prices and competition in these markets.

Lina Khan:

I want to thank again, the staff who worked diligently for months on this study and who went to great lengths to accommodate requests from my fellow commissioners. I view this as a critical issue for the commission and believe the study would advance our mission and benefit the people we are charged with protecting based on the significant need for the commission to explore potential anti-competitive practices that may be negatively affecting drug prices and independent and specialty pharmacies. I am making the following motion, I move that the commission approved the issuance pursuant to its authority under section 6B of the FTC Act of the order circulated under matter number P2212 on February 17th, 2022 to study the pricing and contracting practices of PBMs. Is there a second?

Rebecca Slaughter:

I second.

Lina Khan:

Thanks, Commissioner Slaughter. I will now turn to my fellow commissioners to share any remarks before calling for a vote. Commissioner Phillips.

Noah Phillips:

Thank you, Madam chair. The FTC pursues a comprehensive agenda to address anti-competitive mergers and unlawful conduct in healthcare and pharmaceuticals. I am proud of the work that we do to ensure that Americans continue to benefit from competition in ways that lower costs, increase choice and quality of care. For example, recently blocking the Methodist Tenant Hospital merger and our recent successful settlements and litigation in the Vierra case involving Mr. Martin [inaudible 01:42:14] and his companies and associate.

Noah Phillips:

At a time when inflation is at a 40-year high, healthcare costs are a major issue for most Americans. I continue to be concerned about the out of pocket drug costs american consumers are paying, and I think we need to keep our focus on that. The FTC announced last week that we would today consider a

proposed 6B study on PBMs relationship with their vertically integrated or affiliated pharmacies and non-affiliated or independent pharmacies.

Noah Phillips:

PBMs manage prescription drug benefits for patients on behalf of insurance companies and employers, that 6B study was designed to give us insight into trends over time in contractual provisions between PBMs and pharmacies. It did not address DIR fees in light of the forthcoming CMS rule making to regulate such fees. It did not address prices to consumers. I want to commend staff for their diligence and effort in drafting the study.

Noah Phillips:

Depending on what we found the study might have revealed that certain contractual provisions look different in a PBMs contract with its in-house pharmacies when compared to contracts with non-affiliated or independent pharmacies. The press release for today's meeting claims that "the proposed 6B study will study a competitive impact of contractual provisions, reimbursement adjustments, and other practices affecting drug prices, including those practices that may disadvantage independent or specialty pharmacies." But the 6B study was not designed to assess the competitive effects of those contractual provisions we would study in including on independent pharmacies. The study was one of trends, not outcomes. The study also would not tell us how the contractual provisions at issue might impact drug prices overall or the out of pocket drug costs consumers pay when they go to the pharmacy to get their prescriptions.

Noah Phillips:

To me, the most important things are the amount of money that Americans are spending on prescriptions and the kind of care they are getting. Just hours ago, I received a substantially revised study with no accompanying analysis or supporting documentation, this version goes much broader looking at the relationships between PBMs and pharmaceutical manufacturers, the drug companies, which relationship has been a matter of much public discussion over the years. As far as I know, this new version was prepared in the last day or two. I've not had a chance to review it carefully or to consult with staff in the bureaus of economics or competition are in-house subject matter experts. So I do not know what questions the new study is designed to answer, or whether it is properly scoped to answer them.

Noah Phillips:

Our agency faces practical resource constraints, and 6B studies are serious and expensive matters. They are an important tool given to us by Congress to serve the public interest, to inform the commission, to make recommendations to Congress about legislation and to publish public reports that can form a basis for sound public policy and enforcement. In the past, I have insisted that 6B studies approach questions comprehensively, rigorously and oppose them when they fail that test. If we hope to use our 6B authority to still study the competitive impact of PBM practices, we have to scope a study that can inform the public about whether and how those practices might impact out of pocket drug costs for consumers. I don't have a basis at this point to believe that the proposed 6B study does that, so I'm going to vote, no.

Noah Phillips:

I remain open to working with my colleagues on a 6B study that can generate useful information about prescription drug costs and the role and impact of PBMs. For example, merger retrospectives like those Commissioner Slaughter has called for, or a 6B study designed to study the competitive effects of specific industry practices. We need to find clear questions to test, take the time to scope proper requests and devote the resources to the project moving forward. Thank you, Madam chair.

Lina Khan:

Thanks, Commissioner Phillips. Commissioner Slaughter.

Rebecca Slaughter:

Thank you so much, Madam chair. Let me start by saying, I strongly support doing this study and by doing this study, what I mean is there are many iterations of a PBM study that I could and would enthusiastically support. We heard today some really important and moving testimony from commentators about many different ways PBMs are negatively affecting competition, drug pricing, the provision of services, quality of healthcare, people's access to medicine, the way pharmacy markets are working. I think they're sort of untold numbers of problems with real human costs, many of which we saw faces of today and that counts for a lot. I don't think there is one perfect PBM study. I think there are a lot of really good things we could study in the PBM industry. And I think it is incumbent on us to not make the perfect the enemy of the very, very important and very good.

Rebecca Slaughter:

I will also note that I think our staff has worked exceptionally hard over the last several months to find a version of a study that could earn the support of a majority of our commission of four right now. And they have been bending themselves over backwards, working late nights, weekends, to try to find a way to thread this needle with my colleagues who don't share my view, that we could do many, many different versions of this study. I appreciate Commissioner Phillips concerns that the last version we got was relatively late in time compared to this meeting, but that is a result of the extremely hard work of staff to accommodate concerns that they had heard. And so I don't see that as a bug, I see that as a feature of the really hard work that we are seeing.

Rebecca Slaughter:

It is my expectation based on what I have heard at this point, although I hope to be proven wrong that today's vote will not succeed and I think that is a real shame. I think it is a shame for the American people because this is very important work that I would love to see us getting started on. And I think it's a shame for the commission and the really hardworking staff who have been trying with heroic efforts to get this, not over the finish line, but over the starting line because that's what opening a PBM study would be. It would be this starting point of an important inquiry that would take time and diligence.

Rebecca Slaughter:

And I think as we heard in the testimony today, the time to start is not today, not even yesterday, but has long since passed. So I will continue my interest and support in moving forward. I hope to take Commissioner Phillips up on his offer to continue working to find something that he can support, which I know is made in good faith and I really hope that we can get it done. And I appreciate, Madam chair, you docketing this issue. I appreciate you creating the opportunity for people to call public attention and raise their voices on this important topic. And I will offer my commitment to keep pushing forward on it. And with that, I will turn it back to you.

Lina Khan:

Thank you, Commissioner Slaughter. Commissioner Wilson.

Commissioner Wilson:

Thank you, Madam chair. First, let me thank the Congressman and members of the public for their input on this important issue. As always, hearing directly from our stakeholders is highly informative. Second, I'd like to thank staff and leadership in the bureau of economics, the office of policy planning, mergers one in the healthcare division for their efforts.

Commissioner Wilson:

The PBM team has worked diligently on several iterations of a possible PBM study in recent months. And I know that members of the chair's office and staff worked hard in the last couple of days to prepare the latest permutation that I received at 9:00 p.m last nigh as commissioner Phillips described, this version is far more comprehensive than some of the earlier versions for which I am grateful. For example, I do think it's important to examine manufacturer rebate issues, which I have been advocating for months in which the latest version finally adds.

Commissioner Wilson:

I am confident that the FTC can create a study that employs a data-driven approach to conduct an empirical and objective examination of important questions about competition in the PBM industry. And I look forward to talking with staff, including the bureau of economics about the version I received late last night to understand whether the latest permutation possesses those qualifications.

Commissioner Wilson:

Now, we have an excellent model to follow. In 2003, Congress directed the FTC to study the PBM industry. Congress identified six questions for the FTC to analyze, the FTCs Bureau of Economics and our lawyers carefully crafted data requests to support the examination of these issues. The 6B special orders issued in May 2004 contained 34 detailed specifications. And the ultimate result was a rigorous and data-driven report. Since the FTC issued the 2005 PBM report, the PBM industry has evolved in many ways and our commenters described some of those developments.

Commissioner Wilson:

And during this period, stakeholders have addressed concerns about PBMs. They allege, for example, that PBMs designed formularies to limit lower rebate drugs, steer patients to vertically integrated Pharmacies and mandate the use of mail order pharmacy services against patient wishes require prior authorization and step therapy to the point of delaying or denying patient access to needed medication, drive independent pharmacies out of business thereby creating pharmacy deserts and lessen competition through mergers.

Commissioner Wilson:

The PBMs respond that many of these accusations are baseless and point to data demonstrating that PBMs pass through an increasing percentage of rebates to health plans, reduced plan sponsor and consumer drug spending do not reimburse independent pharmacies at lower rates than PBM owned pharmacies have not impacted independent Pharmac margins which have remained relatively flat pre-

COVID from 2010 to 2019, and have not led to a decrease in the number of independent pharmacies, which have remained relatively flat pre COVID from 2015 to 2019.

Commissioner Wilson:

Given the concerns that have been raised about PBMs, members of Congress have introduced directing the FTC to again, examine the PBM industry. I thank Congresswoman Cathy McMorris Rogers, and Senator Grassleyy for their support of further FTC work in this area. And to be clear, I support an FTC analysis of this industry. In fact, one of the first staff briefings that I requested as a commissioner focused on PBMs. If there is anti-competitive conduct in the supply chain for prescription drugs, I want to know about it. The FTC has a long history of investigating healthcare concerns on both the consumer protection and competition sides of the house, and Commissioner Phillips described some of our latest efforts. The FTC has maintained this focus because healthcare represents a large and growing percentage of our economy. And these expenses are felt by consumers every day.

Commissioner Wilson:

At an open commission meeting last October, we heard patients struggling with skyrocketing insulin costs. Insulin is only one example. Total prescription drug spending in the US reached 348.3 billion in 2020, and PBMs play an important role in the drug distribution chain. Studying this component of the supply chain is critical to informed policy and law enforcement. Through careful preparation and a bipartisan effort, I do expect the FTC to launch a 6B study on the PBM industry. I certainly have questions I would like answered, how do patient experiences including price, quality, convenience, and access vary depending on whether cost fill their prescriptions at independent pharmacies or PBM affiliated pharmacies? What factors drive formulary design? What mechanisms do manufacturers use to disincentivize PBMs from placing their rivals on formularies? But we must use our significant authority and scarce resources judiciously.

Commissioner Wilson:

I have observed previously that stakeholders frequently attempt to co-op the government in their battles against rivals. I am wary of having the FTC used as a pawn to boost the profitability of certain sectors or to insulate them from competition. It is not the role of the FTC to pick winners and losers. Our mission is to protect consumers and competition. For these reasons, the FTC must develop a 6B study with an objective design and credible guarantees that an expert-driven process will produce a data-driven report.

Commissioner Wilson:

I also think it will be useful to reflect on the input that we received today from stakeholders to ensure that we are addressing the most pertinent concerns. As drafted, I believe that there are many issues that were raised today that are left unaddressed in the current version. So I look forward to discussing the latest draft of the 6B study with our staff and working with chair Conn and our experience staff to get the study across the finish line. Thank you.

Lina Khan:

Thanks, Commissioner Wilson. So the motion having being seconded, I will call for a vote. Commissioner Wilson.

Commissioner Wilson:

No.

Lina Khan:

Commissioner Slaughter.

Rebecca Slaughter:

Yes.

Lina Khan:

Commissioner Phillips.

Noah Phillips:

No.

Lina Khan:

And I vote, yes. The motion fails. I have to say I'm really disappointed by this outcome. I think we've now for months been building a record with testimony from both patients and pharmacies alike, underscoring the real urgency and life and death stakes in some instances of this work. I see this as an area where we have a real moral imperative as an agency to act given the authority that Congress has given us. I think this inquiry is long overdue and just one of the many actions that I hope this agency will undertake in this sector.

Lina Khan:

I want to again, thank the many folks from across the agency, across the office of policy planning, the bureau of economics, the healthcare shop and mergers one who worked diligently for many months to produce this comprehensive document. And Commissioner Slaughter said, went to great lengths to draft a document that could win majority support. I want to thank again, members of the public and my fellow commissioners for their comments. And I look forward to continuing working with my colleagues on this front. This concludes the official of the commissioned. The meeting is now adjourned. Hope everybody has a good rest of the day.