

UNITED STATES OF AMERICA Federal Trade Commission

WASHINGTON, D.C. 20580

Concurring Statement of Commissioner Andrew N. Ferguson

Regarding the Pharmacy Benefit Managers Interim Staff Report Matter Number P221200 July 9, 2024

Every American is a consumer of prescription drugs and healthcare, and the prices for those goods and services are out of control. The Commission is responsible for protecting consumers in those markets by enforcing competition among suppliers and middlemen. Competition may not be a panacea for rising healthcare prices in America, but we owe it to Congress and the American consumers to do what we can within our statutory mandate to confront this challenge.

The prescription-drug market is complex and opaque, and the causes for the rising prices are hard to discern. We cannot promote competition in this complex market unless we understand it. To that end, on June 6, 2022, the Commission unanimously issued a set of Orders under Section 6(b) of the Federal Trade Commission Act¹ to the six largest pharmacy benefits managers ("PBMs") in America, requiring them to turn over documents and information "concerning the competitive impact of the[ir] contracting and business practices"² On May 17 and June 8, 2023, the Commission issued three additional 6(b) Orders requiring companies that perform rebate services for PBMs to turn over analogous material.³

This was not the first time the Commission undertook to study the role of PBMs in our healthcare markets. It issued similar orders in May 2004.⁴ and published a thorough report on PBMs in August 2005.⁵ As Commissioners Philips and Wilson explained in their supporting statement of this most recent study, the purpose of the June 2022 Orders was to "examine

² Fed. Trade Comm'n, Order to File a Special Report, FTC Matter No. P221200 at 1, 2–10 (June 6, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221200PBMModelOrder.pdf; see also Press Release, Fed. Trade Comm'n, FTC Launches Inquiry Into Prescription Drug Middlemen Industry (June 7, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-launches-inquiry-prescription-drugmiddlemen-industry.

¹ 15 U.S.C. § 46(b).

³ Press Release, Fed. Trade Comm'n, FTC Deepens Inquiry into Prescription Drug Middlemen (May 17, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-deepens-inquiry-prescription-drug-middlemen; Press Release, Fed. Trade Comm'n, FTC Further Expands Inquiry into Prescription Drug Middlemen Industry Practices (June 8, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-further-expands-inquiry-prescription-drugmiddlemen-industry-practices.

⁴ Pharmacy Benefit Managers: Ownership of Mail-Order Pharmacies, Fed. Trade Comm'n at xxi & appendices A & C (Aug. 2005) (hereinafter "2005 FTC PBM Report"), https://www.ftc.gov/sites/default/files/documents/reports/pharmacy-benefit-managers-ownership-mailorder-pharmacies-federal-trade-commission-report/050906pharmbenefit rpt 0.pdf.

⁵ 2005 FTC PBM Report, *supra* note 4.

relationships between PBMs and pharmacies and also PBMs and pharmaceutical manufacturers, a matter of much public interest" in light of the fact that markets have changed since 2005.⁶

The Commission's investigative and report-writing power pursuant to Section 6 of the Federal Trade Commission Act⁷ is a valuable tool in the agency's policymaking toolbox. Section 6(b) studies and reports contribute greatly to the Commission's successes in serving the public interest. Over the years, 6(b) studies have revealed the inner workings of complex markets or industries and have led, at times, to substantial federal legislation.⁸

Today the Commission releases the Pharmacy Benefit Managers Interim Staff Report ("PBM Interim Staff Report"). It is not a statement or report of the Commission. It is instead the staff's report to the Commission about how it understands our complex healthcare markets in light of the information it has thus far received in response to the 2022 and 2023 Orders.

While I concur in the release of the PBM Interim Staff Report, I write to highlight the unusual nature of this particular interim report and to share my concerns about resource-deployment decisions that have hindered the Commission's ability to complete this 6(b) study in a timely manner.

First, interim reports are rare—most 6(b) studies culminate in a single final report. This PBM Interim Staff Report is especially unusual for several reasons. It relies, throughout, in large part on public information that was not collected from the PBMs or their affiliates during the 6(b) process. Additionally, it relies heavily on public comments, with staff having reviewed over 1,200 comments and citing over four dozen. But public comments are rather beside the point of the 6(b) study.

⁶ Noah Joshua Philips and Christine S. Wilson, Comm'rs, Fed. Trade Comm'n, Concurring Statement Regarding 6(b) Orders to Study Contracting Practices of Pharmacy Benefit Managers at 1–2 (June 6, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221200PhillipsWilsonPBMStatement.pdf.

⁷ 15 U.S.C. § 46.

⁸ Office of Policy Planning, Fed. Trade Comm'n, History of Section 6 Report-Writing at the Federal Trade Commission at 2 (April 1981) (citing Boyle, Economic Reports and the Federal Trade Commission: 50 Years' Experience, 24 Fed. Bar. J. 489, 493 (1964)), https://www.ftc.gov/sites/default/files/documents/reports/history-section-6-report-writing-federal-trade-commission/231984.pdf (highlighting the Packers and Stockyards Act, The Securities Act of 1933, the Stock Exchange Act of 1934, and the Public Utility Holding Company Act of 1935 as resulting from Commission investigations); see also *id.* at 7–8.

⁹ See, e.g., Feeding America in a Time of Crisis The United States Grocery Supply Chain and the COVID-19 Pandemic, FTC Staff Report (March 21, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/p162318supplychain-report2024.pdf; Non-HSR Reported Acquisitions by Select Technology Platforms, 2010–2019: An FTC Study (Sept. 15, 2021), <a href="https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technology-platformstudy2021.pdf; cf. Authorized Generics: An Interim Report, Federal Trade Commission Report (June 2009), https://www.ftc.gov/sites/default/files/documents/reports/authorized-generics-interim-report-federal-trade-commission/p062105authorized-generics-interim-report-federal-trade-commission/p062105authorized-generics-interim-report-federal-trade-commission/p062105authorized-generics-interim-report-federal-trade-commission/p062105authorized-generics-interim-report-federal-trade-commission/p062105authorized-generics-interim-report-federal-trade-commission/p062105authorized-generics-interim-report-federal-trade-commission/p062105authorized-generics-interim-report-federal-trade-commission/p062105authorized-generics-interim-report-federal-trade-commission/p062105authorized-generics-interim-report-federal-trade-commission/gone-federal-trade-generics-interim-report-federal-trade-generics-interim-report-federal-trade-generics-interim-report-federal-trade-generics-interim-report-federal-trade-generics-interim-report-federal-trade-generics-interim-report-federal-trade-generics-interim-report-federal-trade-generics-interim-report-federal-trade-generics-interim-report-federal-trade-generics-interim-report-federal-trade-generics-interim-report-federal-trade-generics-interim-report

¹⁰ PBM Interim Staff Report at 4; see generally *id*.

As an initial matter, over 160 of the public comments reviewed in connection with this study were submitted anonymously. 11—including several of the comments cited in the PBM Interim Staff Report. 12 My colleagues are correct that comments, even anonymous ones, are an important part of the Commission's enforcement and 6(b) process. 13 But we ought to treat anonymous comments with circumspection. After all, we cannot know who submitted the comments, nor do we have any method for verifying the accuracy of a single word they contain. We therefore cannot be sure how much weight, if any, to accord them as we try to understand these markets. The PBM Interim Staff Report nevertheless ascribes those anonymous submissions to independent pharmacies, or pharmacies generally, and treats their contents as fact.. 14

Separately, many of the other comments on which the PBM Interim Staff Report relies were submitted by entities who contract with PBMs. Irrespective of the effect that PBMs' practices have on consumers, firms who contract with PBMs may have an incentive to instigate regulatory action against PBMs to improve their bargaining position. So, when the time for a final report comes, the Commission ought to treat these comments with a bit more circumspection than the PBM Interim Staff Report does.

I would also be remiss not to note that, at this stage, the PBM Interim Staff Report makes findings as to PBMs' pharmacy-reimbursement practices and incentives as to only two case-study drugs. ¹⁵ The case studies are illuminating, but hardly definitive. Before issuing a final report, we need to determine whether these findings are representative of market dynamics for other drugs, and we need to learn whether any reimbursement practices ultimately affect consumers' out-of-pocket costs. Prescription-drug prices have risen higher and higher, with list prices on average outstripping even the runaway inflation of the last few years. ¹⁶ We need to understand whether any anticompetitive or unfair or deceptive acts or practices on the part of PBMs or any other market participants are contributing to these prices.

Second, I am troubled that the PBM Interim Staff Report repeatedly claims that some of the PBMs have not yet complied with the June 2022 Orders issued to them ("PBM Orders") over two years ago. ¹⁷ The Chair raised concerns over the PBMs' delays in compliance almost five

¹¹ Regulations.gov, Solicitation for Comment Posted by the Federal Trade Commission on Feb 24, 2022, FTC-2022-0015, All Comments on Docket, https://www.regulations.gov/document/FTC-2022-0015-0001/comment?filter= anonymous (last visited July 2, 2024).

¹² See PBM Interim Staff Report at 16 n.71 (anonymous comment as source describing role of independent pharmacy in rural and underserved areas), 48 n.230 (anonymous comments as source describing PBM negotiation leverage with independent pharmacies), 51 n.246 (anonymous comment as source for extract of PBM facsimile to independent pharmacies), 58 nn. 275 & 278 (anonymous comments as source for opaque contracts and rates experienced by pharmacies).

¹³ Lina Khan, Chair, Fed. Trade Comm'n, Joined by Alvaro M. Bedoya and Rebecca Kelly Slaughter, Comm'rs, Fed. Trade Comm'n, Statement Regarding the Pharmacy Benefit Managers Interim Staff Report at 3 (July 9, 2024).

¹⁴ See *supra*, note 12.

¹⁵ PBM Interim Staff Report, Subsection III.B.

¹⁶ See U.S. Dep't of Health and Human Servs., ASPE Office of Health Policy, Issue Brief, Changes in the List Prices of Prescription Drugs, 2017-2023 at 1 (Oct. 6, 2023), https://aspe.hhs.gov/sites/default/files/documents/0cdd8805 9165eef3bed1fc587a0fd68a/aspe-drug-price-tracking-brief.pdf.

¹⁷ See PBM Interim Staff Report at 2, 34 n.172, 37, 43, 53; Press Release, Fed. Trade Comm'n, FTC Launches Inquiry Into Prescription Drug Middlemen Industry (June 7, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-launches-inquiry-prescription-drug-middle-men-industry.

months ago. ¹⁸ Yet, to date, the Commission has taken no steps to enforce the PBM Orders. If the PBM Order recipients are engaging in dilatory tactics and are not complying, the Commission should turn to the courts and move to enforce the PBM Orders immediately. The role of PBMs in our healthcare markets is of immense public concern, and we should deploy resources to bring this 6(b) study to a conclusion.

I am disappointed, but not surprised, that promptly advancing this 6(b) study took a backseat to other Commission business. The component of the Commission responsible for this 6(b) study, full of hardworking and talented lawyers, economists, and policy staff, is the same component that devoted more than a year and massive quantities of manpower.¹⁹ to the Commission's ill-fated Non-Compete Clause Rule—a rule which we lacked any power to promulgate,²⁰ and which has since been preliminarily enjoined by the U.S. District Court for the Northern District of Texas.²¹

My concerns notwithstanding, I support the release of this PBM Interim Staff Report because I agree it is important for the Commission to share what staff has learned to date, such as it is. To be sure, unanswered questions about the role PBMs play in our opaque healthcare and prescription-drug markets remain. Staff and the Commission have much still to learn. But I cannot think of a good reason to deny to the public and Congress the staff's understanding of those markets more than two years after we issued the June 2022 orders.

Insofar as the PBMs are refusing to comply with the PBM Orders, I hope the Commission will move to enforce them. We must allow staff to finish this work expeditiously so that the Commission, Congress, and the public can benefit from a final 6(b) report on the role of PBMs in our healthcare and prescription-drug markets.

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¹⁸ Lina Khan, Chair, Fed. Trade Comm'n, Letter to the Honorable Charles E. Grassley, United States Senate at 2 (Feb. 13, 2024), https://www.grassley.senate.gov/imo/media/doc/ftc to grassley - pbm 6b study.pdf.

¹⁹ See, e.g., Rebecca Kelly Slaughter, Comm'r, Fed. Trade Comm'n, Remarks as Prepared for Delivery Supporting the Final Rule Banning Noncompete Agreements at 1 (April 23, 2024) ("I want to highlight the incredible work of our staff on this rule. An immense amount of labor went into reviewing the more than 26,000 comments and incorporating that feedback into the final rule."); Tr. of Open Commission Meeting, April 23, 2024 at 5 ("As anyone who has worked on a rulemaking can attest, this just requires an enormous amount of work that goes into these rules. And the team here has done just an absolutely outstanding job.") (statement of Lina Khan, Chair, Fed. Trade Comm'n); *id.* at 7 ("I want to join all of you in thanking all the staff that made this possible. This is a gargantuan amount of work.") (statement of Alvaro M. Bedoya, Comm'r, Fed. Trade Comm'n).

²⁰ Andrew N. Ferguson, Comm'r, Fed. Trade Comm'n, Joined by Melissa Holyoak, Comm'r, Fed. Trade Comm'n, Dissenting Statement In the Matter of the Non-Compete Clause Rule, Matter Number P201200 (June 28, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf; Melissa Holyoak, Comm'r, Fed. Trade Comm'n, Dissenting Statement In the Matter of the Non-Compete Clause Rule, Matter Number P201200 (June 28, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2024-6-28-commissioner-holyoak-nc.pdf.

²¹ Ryan LLC v. FTC, No. 3:24-CV-00986-E, slip op. at 32 (N.D. Tex., July 3, 2024).