

## UNITED STATES OF AMERICA Federal Trade Commission

WASHINGTON, D.C. 20580

## Concurring Statement of Commissioner Andrew N. Ferguson Joined by Commissioner Melissa Holyoak Regarding the Second Pharmacy Benefit Managers Interim Staff Report Matter Number P221200

January 14, 2025

The Commission today issues a second interim staff report in connection with its ongoing Section 6(b) study into pharmacy benefit managers ("PBMs"). I am not surprised that the Biden-Harris Commission is releasing one more interim report on its way out the door. After having already issued one rare interim report, what's one more? Were it up to me, I would have preferred the Commission take the time needed to complete its work and issue a final report when it is ready to do so. But that alone is not good enough reason to deny Congress and the public the Commission staff's additional insight.

The second interim staff report is a marked improvement over the first. It is largely empirical, focusing on the data the Commission received in response to its Section 6(b) orders rather than cherry-picked, anonymous comments. It meaningfully expands on staff's initial two case studies regarding specialty generic drugs. Indeed, the second interim staff report focuses entirely on specialty generics. The Commission staff could not have performed much of this specialty-generics analysis by the time the Commission released the first interim report because the Commission was awaiting additional data from at least some of the PBMs. Subsequently produced data made possible the majority of what today's interim report contains.

That said, my Democratic colleagues had previously suggested that failures by the study's PBM respondents to timely comply with the Section 6(b) orders were the principal cause of delay in the final report's completion, and claimed they were one of the justifications for issuing an interim report.<sup>4</sup> My own review of what was produced before the interim report has made clear, however, that my colleagues' claim was overstated. It is clear that resource-allocation decisions

<sup>&</sup>lt;sup>1</sup> See Concurring Statement of Comm'r Andrew N. Ferguson, Regarding the Pharmacy Benefit Managers Interim Staff Report, Matter No. P221200, at 2–3 (July 9, 2024) ("Ferguson First PBM Interim Staff Report Statement").

<sup>&</sup>lt;sup>3</sup> Second Interim Staff Report, Specialty Generic Drugs: A Growing Profit Center for Vertically Integrated Pharmacy Benefit Managers (Jan. 2025).

<sup>&</sup>lt;sup>4</sup> Statement of Chair Lina M. Khan, Joined by Comm'rs Alvaro M. Bedoya & Rebecca Kelly Slaughter, Regarding the Pharmacy Benefit Managers Interim Staff Report Commission, File No. P221200, at 3 n.7 (July 9, 2024) ("The PBM Interim Report provides an update to the public about the study's progress; failures by the study's respondents to timely provide the requested information are a necessary part of that progress report."); Statement of Comm'r Rebecca Kelly Slaughter, Regarding FTC Staff Interim Report: Pharmacy Benefit Managers, As prepared for delivery at the FTC Open Commission Meeting, at 1 (Aug. 1, 2024) ("This 6(b) study is not yet final, but I believe there is substantial value in releasing the information we know so far. The alternative to doing so would be to reward recalcitrant 6(b) order recipients for delays in production.").

made by the Chair, not PBM obstinance, has been the primary cause of the delay in the final report's completion.<sup>5</sup>

The Commission still has more work to do on this Section 6(b) study. I remain committed to bringing it to a conclusion, culminating in a final report. That process necessarily will require Commission staff to engage meaningfully with the order recipients, as has long been the Commission's practice. Such engagement ensures that the Commission understands the context for the documents and raw data it obtains from the Section 6(b) order recipients. Without that context, we cannot fulfill Congress's command to "evaluate and report facts which reveal[] the structure of our economy" in an objective way. We best serve Congress, state legislators, and the American people when we produce comprehensive, fact-based, and data-driven final reports. That is what the Commission must do.

<sup>&</sup>lt;sup>5</sup> See, e.g., Ferguson First PBM Interim Staff Report Statement at 4 & n.19.

<sup>&</sup>lt;sup>6</sup> *Id*. at 4.

<sup>&</sup>lt;sup>7</sup> Paul Rand Dixon, The Federal Trade Commission: Its Fact Finding Responsibilities and Powers, 46 Marq. L. Rev. 17, 17 (1962).