UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Rebecca Kelly Slaughter

Statement of Commissioner Rebecca Kelly Slaughter

Regarding the Commission Statement on Reliance on Prior PBM-Related Advocacy Statements and Reports that No Longer Reflect Current Market Realities
As Prepared for Delivery

Federal Trade Commission Open Meeting
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Thank you to our hard-working staff in the Office of Policy Coordination for your ongoing work on the PBM 6(b) Study and crafting today's Commission Statement. Additional thanks go to staff in the Bureau of Competition who also worked on today's Statement.

I am pleased to support the Commission's Statement Concerning Reliance on Prior PBM-Related Advocacy Statements and Reports That No Longer Reflect Current Market Realities for two primary reasons. First, it advances the Commission's commitment to providing the public clarity on our competition enforcement and policies. And second, staying silent on the risk of misplaced reliance on our outdated PBM guidance may significantly harm patients and other stakeholders in healthcare markets.

Principles of transparency and good government make it incumbent on the Commission to notify the public of business practices we identify as potentially unlawful, and to update our notice and guidance as our understanding of markets evolves. Consistent with that obligation, the Commission should inform the public when our prior policy guidance may no longer reflect our current learning and experience. That is the case here.

Between 2004 and 2017 the Commission published or issued eleven letters and reports that advocated against implementing mandatory disclosure and transparency requirements on PBMs. These materials primarily relied on the understanding that the structure of relevant healthcare markets was sufficiently competitive and that mandating certain disclosures by PBMs risked unintended anticompetitive consequences, including collusion among PBMs. However, during this period, several experts questioned the accuracy of the information and analyses underlying the Commission's conclusions. Among them was then FTC Commissioner Julie Brill. In an August 2014 letter to the U.S. Department of Labor's ERISA Advisory Council, Commissioner Brill cautioned the Council against relying on prior FTC advocacy and reports that advised against imposing mandatory compensation and fee disclosures on PBMs.[1] In addition to describing as "questionable" the level of competition in the PBM market at the time, she noted that PBM study released by the FTC in 2005 in particular was "quite old at this point, and could

[1] Letter from Comm'r Julie Brill to Larry Good, Executive Secretary ERISA Advisory Council, U.S. Dep't of Labor (Aug. 19, 2014), https://www.ftc.gov/system/files/documents/public_statements/579031/140819erisaletter.pdf

not have taken into account the significant changes that have occurred in the market since 2005."[2]

Since Commissioner Brill expressed her concerns in 2014, the competitively troubling changes in the PBM market have increased significantly. To name a few, vertical integration and horizontal concentration among payers, PBMs, pharmacies and providers have accelerated while the number of independent pharmacies and visibility into PBM contracting practices have decreased; and list prices and patients' out-of-pocket costs for prescription drugs have increased as PBM rebates and fees have mushroomed.

In light of these troubling market developments, the Commission authorized in June 2022, a study under Section 6(b) of the FTC Act of certain PBM market structures and practices.[3] This ongoing study is an important step towards helping the Commission identify and understand what roles PBMs play in contributing to the opaque and complex web of challenges that adversely affect price, quality, consumer choice, and competition in the U.S. pharmaceutical market.

I know many observers—myself included—eagerly anticipate the results of that study. However, we do not need to wait for it to be completed to update the public on what we already know to be true: the Commission's prior PBM statements do not reflect contemporary market realities. The update is necessary given the substantial costs patients may bear if policy makers, other government agencies, academics, or market participants rely upon outdated Commission advocacy as the basis for not advancing solutions to any anticompetitive market outcomes driven by PBM compensation and fee practices.

For these reasons, I wholeheartedly support approval and issuance of the Commission's Statement Concerning Reliance on Prior PBM-Related Advocacy Statements and Reports That No Longer Reflect Current Market Realities. Thank you.

[2] *Id.*

[3] 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-middlemen-industry.