

## **Federal Trade Commission Statement Concerning Reliance on Prior PBM-Related Advocacy Statements and Reports That No Longer Reflect Current Market Realities**

The Federal Trade Commission (“FTC” or “Commission”) cautions against reliance on certain of its prior advocacy statements and reports relating to the pharmacy benefit manager (“PBM”) market. The Commission is currently engaged in a major study of the PBM industry, undertaken in large part due to the Commission’s recognition that substantial changes have taken place over the last two decades.<sup>1</sup> This study will enable the Commission to consider the extent to which prior conclusions about the PBM industry remain valid. Accordingly, until it is completed, reliance on the Commission’s conclusions in certain prior statements and reports may be misplaced. with increased vertical integration and horizontal concentration; the growth

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<sup>1</sup> See 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>.

<sup>2</sup> One Commissioner notably dissented from these policy positions on the basis of changing PBM market dynamics driven by consolidation. See 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> (dissenting due to concerns that staff’s conclusions were based on outdated information). See also Dissenting Statement of Comm’r Julie Brill Concerning the Proposed Acquisition of Medco Health Solutions Inc. by Express Scripts, Inc., FTC File No. 110-

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transparency requirements.<sup>12</sup> We believe this reliance is misplaced in light of significant changes in market conditions. Pharmaceutical markets have evolved, and the Commission is concerned that these older statements, studies, and reports may no longer reflect current market realities.

Accordingly, the FTC warns against relying on the following nine Commission advocacy letters advocating against proposals to increase regulatory oversight and transparency of PBMs:

- April 8, 2004 letter to Rhode Island Attorney General Patrick C. Lynch and Rhode Island State Senator Juan M. Pichardo regarding Rhode Island General Assembly Bills e 2004-H 7042, 2004-H 7047, 2004-H 7129, 2004-H 7131, 2004-H 7417, 2004-S 2015, and 2004-S 2140;<sup>13</sup>
- September 7, 2004 letter to California Assembly Member Greg Aghazarian regarding California Assembly Bill No. 1960;<sup>14</sup>
- March 8, 2005 letter to North Dakota State Senator Richard L. Brown regarding North Dakota House Bill 1332;<sup>15</sup>

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<sup>12</sup> See Complaint and Prayer for Declaratory and Injunctive Relief at 19, *Pharmaceutical Care Management Association v. HHS et al.* (Jan. 11, 2021) (citing Sept. 7, 2004 Letter from FTC Staff to Greg Aghazarian, California State Assembly Member, California State Assembly (Sept. 7, 2004), [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-comment-hon.greg-aghazarian-concerning-ca.b.1960-requiring-pharmacy-benefit-managers-make-disclosures-purchasers-and-prospective-purchasers/v040027.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-hon.greg-aghazarian-concerning-ca.b.1960-requiring-pharmacy-benefit-managers-make-disclosures-purchasers-and-prospective-purchasers/v040027.pdf)); Pharmaceutical Care Management Association, Public Comment in Response to FTC Solicitation for Public Comments on the Business Practices of PBMs (May 25, 2022), <https://www.pcmagnet.org/wp-content/uploads/2022/05/PCMA-FTC-Public-Comment-Letter-May-25-20221.pdf> (citing Letter from FTC Staff to Hon. James L. Seward, New York Senator, 51<sup>st</sup> District (Mar.31, 2009), [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-comment-honorable-james-l.seward-concerning-new-york-senate-bill-58-pharmacy-benefit-managers-pbms/v090006newyorkpbm.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-honorable-james-l.seward-concerning-new-york-senate-bill-58-pharmacy-benefit-managers-pbms/v090006newyorkpbm.pdf)).

<sup>13</sup> Letter from FTC Staff to Patrick C. Lynch, Attorney General, State of Rhode Island and Providence Plantations, and Juan M. Pichardo, Senate Deputy Majority Leader, Rhode Island Senate (Apr. 8, 2004), [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-comment-hon.patrick-c.lynch-and-hon.juan-m.pichardo-concerning-competitive-effects-ri-general-assembly-bills-containing-pharmaceutical-freedom/ribills.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-hon.patrick-c.lynch-and-hon.juan-m.pichardo-concerning-competitive-effects-ri-general-assembly-bills-containing-pharmaceutical-freedom/ribills.pdf).

<sup>14</sup> Letter from FTC Staff to Greg Aghazarian, California State Assembly Member, California State Assembly (Sept. 7, 2004), [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-comment-hon.greg-aghazarian-concerning-ca.b.1960-requiring-pharmacy-benefit-managers-make-disclosures-purchasers-and-prospective-purchasers/v040027.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-hon.greg-aghazarian-concerning-ca.b.1960-requiring-pharmacy-benefit-managers-make-disclosures-purchasers-and-prospective-purchasers/v040027.pdf).

<sup>15</sup> Letter from FTC Staff to Richard L. Brown, Senator, North Dakota Senate (Mar. 8, 2005), [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-comment-honorable-richard-l.brown-concerning-north-dakota-h.b.1332-regulate-contractual-relationship-between-pharmacy-benefit-managers-and-covered-entities/050311northdakotacomnts.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-honorable-richard-l.brown-concerning-north-dakota-h.b.1332-regulate-contractual-relationship-between-pharmacy-benefit-managers-and-covered-entities/050311northdakotacomnts.pdf).

- October 2, 2006 letter to Commonwealth of Virginia Delegate Terry G. Kilgore regarding Virginia House Bill No. 945;<sup>16</sup>
- April 17, 2007 letter to

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Benefit Managers: Ownership of Mail-Order Pharmacies.”<sup>22</sup> These reports may no longer accurately reflect the current state of the PBM industry.

The Commission discourages reliance on these advocacy letters and Commission reports until its current PBM study is complete and earlier materials can be reevaluated in light of current market conditions.

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<sup>22</sup> FED. TRADE COMM’N AND DEP’T OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (July 2004), <https://www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723healthcarerpt.pdf>; FED. TRADE COMM’N, PHARMACY BENEFIT MANAGERS: OWNERSHIP OF MAIL-ORDER PHARMACIES (Aug. 2005), [https://www.ftc.gov/sites/default/files/documents/reports/pharmacy-benefit-managers-ownership-mail-order-pharmacies-federal-trade-commission-report/050906pharmbenefitrpt\\_0.pdf](https://www.ftc.gov/sites/default/files/documents/reports/pharmacy-benefit-managers-ownership-mail-order-pharmacies-federal-trade-commission-report/050906pharmbenefitrpt_0.pdf).