



Office of Commissioner

Melissa Holyoa. The costs of

pharmaceuticals—are an important component of these
insurance, there are legitimate concerns that Pharmacy
rely impact the delivery of pharmacy benefits. These
develop drug formularies for their clients, negotia
ent on formularies, and provide mail and specialty

¹ Concerning reports regarding PBM business practices, I suggest to me that the public needs a better understanding of the PBM business model—including a detailed review of their pricing decisions and effects on competition. As pharmaceutical prices continue to rise, PBMs' practices warrant further study to better understand their role in healthcare markets. Indeed, in my role as Solicitor General of Utah, I was supportive of a law enforcement action against PBMs, where the state sought and law warrant such action.

Historically, the Federal Trade Commission has used its 6(b) authority to study industries and issues, gather information, and issue reports that are “in the public interest.” These reports have provided Congress and the public with evidence-based, objective, and economically sound information that can shape the national debate on a wide range of important issues that affect our lives. See <https://www.ftc.gov/press-releases/2016/05/ftc-reports-pharmacy>

short of excellence. Indeed, when a Commission report reflects the historical excellence that the public has come to expect, it can generate significant public engagement and facilitate fruitful policy debates.

But today's Report fails to meet that rigorous standard. To begin with, the Report was plagued by process irregularities and concerns over the substance—or lack thereof—of the original order.⁸ In fact, the politicized nature of the process appears to have the departure of at least one senior leader from the Commission.⁹ The concern

Commission. And most importantly, the Report leaves us without a better understanding of the competition concerns surrounding PBMs or how consumers are impacted by PBM practices therefore dissent.

To find the benchmark for a high-quality Commission report, the Commission's 2005 report on the PBM industry is a good example.¹⁰ The report, Pharmacy Benefit Managers: Ownership of Mail-Order Pharmacies ("2005 Report"), was issued by a unanimous Commission¹¹ and reflects the type of rigor that the public expects from the Commission. The 2005 Report is thorough, objective, relies on empirics and economics, and avoids hyperbolic language.¹² To be sure, as the cost of prescription drugs continues to rise, it is legitimate to ask whether the empirical conclusions of the 2005 Report reflect the current state of our nation's healthcare markets. Indeed, when authorizing the related order for this report, Commissioners Phillips and Wilsor hoped today's Report would "allow the FTC to update the findings of the 2005 study."¹³ Despite this hope, the Report does not directly engage with the economic findings and conclusions of the 2005 Report and provides no explanation of contradictions between the reports¹⁴

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Commission reports [including the 2005 Report] until its current PBM study is complete and earlier materials can be reevaluated in light of current market conditions.¹⁶ But the warning label was placed on the 2005 Report prior to FTC staff conducting any new market analysis. Assuming conclusions without analysis should not be Commission practice.

Setting these highly irregular events aside, it asserts that market conditions have changed is one thing—but to ignore the 2005 Report without conducting a new empirical analysis of market conditions or explaining why the findings, conclusions, and empirical work no longer apply is a different matter entirely. Among other things, the Report does not address the seemingly contradictory conclusions in the 2005 Report that PBMs, including vertically owned PBMs, generated cost savings for consumers.¹⁷ In fact, the Report does not present any empirical evidence to rebut the 2005 Report's findings. Chair Khan's statement fails to identify any scholarship or empirical evidence to support overturning and otherwise ignoring the 2005 Report.¹⁸ Instead, she cobbles together structural observations that in her apparent view dispenses with the need to conduct comprehensive and empirical analysis of the PBM market. I disagree. Additionally, we should resist calls to overturn staff's work regardless of how powerful those calls may be—without unimpeachable evidence that the work is no longer consistent with empirical reality.¹⁹

Beyond failing to address the 2005 Report, the Report fails to meet the standards of economic rigor expected of Commission reports more generally. The Report provides no analysis of the competitive environment in which PBMs operate or how it has changed in the intervening years since 2005. Nor does it explain how competition among PBMs—even vertically integrated ones—mitigates or exacerbates the role PBMs play in the healthcare market. Markets, sponsors, or example, are sophisticated parties themselves, and evaluating the dynamics between them and PBMs is critical to understanding market realities. Put differently, it is impossible to evaluate the PBMs' conduct in isolation from that of other market participants.

Perhaps most troubling is the Report's failure to examine how PBM practices affect consumer prices. I previously supported law enforcement action against PBMs because I found that, in certain situations, PBMs' conduct had the effect of raising the costs of life-saving prescription drugs for patients. However, the Report does not provide any empirical evidence as

¹⁶ Fed Trade Comm'n Statement Concerning Reliance on Prior PBM-Related Advocacy Statements and Reports That No Longer Reflect Current Market Realities at 6 (Jul. 20, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/CLEANPBMStatement7182023%28OPPFinalRevisionsnoon%29.pdf (hereinafter "Statement on Prior PBM-Related Advocacy").

¹⁷ 2005 FTC PBM REPORT at vi ("For large PBMs, average total prices at owned-or-lease pharmacies typically were lower than at mail-order pharmacies not owned by the large PBMs.") and vii ("Retailer-owned PBMs esdged lower total average prices than independent pharmacies. 12794-1893259 (FTJ) 2021genatim at 10710 (ai) 203 (1) 603-717 (6.49)

nothing about consumer costs. Nor does the Chair's statement specify who is being overcharged, or who bears what portion of the claimed overcharge (patients or Payers/Sponsors). Second, without understanding whether the examples are representative and without examining the overall price for the services Payers/Sponsors purchase—and most importantly, the impact on consumer prices—the Commission has failed to advance the public's understanding of PBM practices. Our job is not to score cheap points for transient political favors, but to identify and protect against anticompetitive harm.

Applying an "interim" label to the report does not relieve the Commission from its duty as a competition thought leader to generate reports that are rigorous and objective in tone. Nor does the specter of an upcoming Presidential election²⁵ or data are still being analyzed²⁵ then the Commission should delay the report until the analyses are complete, rather than producing a premature and deficient report.²⁶ And if parties have failed to produce requested information, then the Commission should utilize the courts to compel production.²⁷ Publicly browbeating parties for allegedly delinquent productions—in a Commission report—does not advance TJ 0 Tc 0 Tw

