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February 26, 2020

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610
Washington, DC 20580

Antitrust Division
Department of Justice
450 Fifth Street NW, Suite 4100
Washington, DC 20530

Re: Federal Trade Commission and Department of Justice’s Draft Vertical Merger Guidelines

To Whom it May Concern:

Our organizations write to express our concerns with the lack of vertical merger enforcement policy that currently exists in the healthcare market and appreciate the opportunity to offer our recommendations on the Federal Trade Commission and Department of Justice’s Draft Vertical Merger Guidelines (Draft Guidelines). We are a group of multi-disciplined stakeholders who represent pharmacies and pharmacists that have a vested interest in encouraging the prevalence of patient centered healthcare services. Our members are directly impacted by the wave of consolidation that is transforming the U.S. healthcare system, which is now largely controlled by a concentrated number of vertically integrated for-profit entities. Our organizations explain below how the agencies’ approach to vertical merger enforcement could be strengthened beyond what has been delineated in the Draft Guidelines.

First, we recommend that the agencies closely evaluate vertical consolidation in healthcare, as it has yielded significant anticompetitive effects without promised improvements in cost or quality. In the pharmacy sector, for example, the three largest pharmacy benefit managers (PBMs) control more than three quarters of all prescriptions filled in America - equaling over 3.3 billion prescriptions, and each of these PBMs has been combined with other, equally powerful companies in the healthcare value chain.¹ In the past two years alone, CVS Health (which was already both the single largest pharmacy chain in the country and the second largest PBM) acquired Aetna (the third-largest health insurance company in the country); and Cigna (another of the so-called “big-five” health insurers) acquired Express Scripts (the largest PBM). The third major

¹ Adam J. Fein, “CVS, Express Scripts, and the Evolution of the PBM Business Model,” Drug Channels (May 29, 2019) available at <https://www.drugchannels.net/2019/05/cvs-express-scripts-and-evolution-of.html> [hereinafter “Fein 2019”]; Alia Paavola, “Top PBMs by Market Share,” Becker’s Hospital Review (May 30, 2019) available at <https://www.beckershospitalreview.com/pharmacy/top-pbms-by-market-share.html> [hereinafter “Paavola 2019”].

PBM (OptumRx) is already affiliated with the single largest health insurer in the country (UnitedHealthcare). This surge in vertical consolidation has essentially created an oligopoly of integrated healthcare companies controlling nearly all aspects of the healthcare and pharmacy supply chain.

A growing body of research evidence, including from current and former agency officials, shows that vertical consolidation in healthcare has led to increased prices without offsetting improvements in quality.² While the empirical evidence mostly represents vertical integration among healthcare providers (where data is more readily available), the reality is that nearly all aspects of the U.S. healthcare system exhibit high and increasing levels of concentration. According to public sources: as stated above, the three largest PBMs collectively control more than three quarters of all prescriptions filled in America;³ the two largest pharmacy chains command a 50-70% share across the country's largest markets;⁴ and the four largest commercial health insurers account for more than 80% of the country's commercial health insurance business, with the majority of local markets dominated by no more than two insurers controlling over 70% of the market.⁵

Our organizations believe that healthcare consolidation requires reinvigorated and reimaged antitrust enforcement policy rather than a continuation of the status quo. Given the evidence of anticompetitive harm from vertical consolidation, we ask the federal antitrust enforcement agencies to consider renewed approaches to tackling concentration in the healthcare sector. Unfortunately, the Draft Guidelines largely restate conventional analytical approaches that have failed to protect competition and healthcare consumers. The agencies' permissive approach to vertical mergers has allowed transformational consolidation in the healthcare system, therefore, we believe a fundamental reshaping of the agencies' vertical merger enforcement policies is necessary.

We urge the agencies to account for anticompetitive harm to healthcare access, quality, and service in vertical merger enforcement policy as it relates to the healthcare sector. These Draft Guidelines recognize that anticompetitive harm can take multiple forms – by, for example, leading to higher prices *or* diminished quality or service.⁶ In the healthcare field, these “non-price” factors are of paramount importance. Because the public health benefits of ensuring access to high-quality care may be difficult to quantify, healthcare antitrust enforcement must deliberately account for

² See, e.g., Thomas G. Koch, Brett W. Wendling, Nathan E. Wilson, Fed. Trade Comm'n Bureau of Economics Working Paper No. 337, “The Effects of Physician and Hospital Integration on Medicare Beneficiaries Health Outcomes” at 5 (July 2018); Hannah T. Neprash and J. Michael McWilliams, “Provider Consolidation and Potential Efficiency Gains: A Review of Theory and Evidence,” 82 Antitrust Law Journal No. 2 551, 553 (2019); *id.* at 577; Laurence C. Baker, M. Kate Bundorf, and Daniel P. Kessler, “Vertical Integration: Hospital Ownership of Physician Practices is Associated with Higher Prices and Spending,” 33 Health Affairs No. 5, 756, 762 (2014).

³ Fein 2019; Paavola 2019.

⁴ Thomas L. Greaney, The New Health Care Merger Wave: Does the ‘Vertical Good’ Maxim Apply?, 46 J. Law, Medicine & Ethics 918, 921 (2018).

⁵ *Id.*; see also L. Dafny, “Health Insurance Industry Consolidation: What Do We Know From the Past, Is It Relevant in Light of the ACA, and What Should We Ask?” Testimony Before the Subcomm. on Antitrust, Competition Policy, and Consumer Rights of the S. Comm. on the Judiciary, 114 Cong. 5 (2015) *available at*: <http://www.judiciary.senate.gov/imo/media/doc/09-22-15%20Dafny%20Testimony%20Updated.pdf>.

⁶ See Draft Guidelines § 5; see also Fed. Trade Comm'n and United States Dep't of Justice, Horizontal Merger Guidelines § 1 (2010).

ways that a transaction may harm competition in ways other than higher prices, including the mechanisms identified in the Draft Guidelines:

- *Network foreclosure and exclusionary steering.* For example, a health insurer or PBM that merges with a large retail pharmacy chain may have the incentive to exclude competing pharmacies from preferred networks or to provide financial incentives to utilize the acquired pharmacies over the patients' pharmacy of choice.
- *Enhanced bargaining leverage and raising rivals' costs.* To use the same example, even if the merged company does not directly exclude competing pharmacies, it may have the incentive and ability to demand unsustainable reimbursement rates from competing pharmacies in exchange for continued participation in pharmacy networks.
- *Unfair and anticompetitive conflicts of interest.* Vertical integration of PBMs with pharmacy chains and other companies in the pharmaceutical supply chain create conflicts of interest ripe for anticompetitive conduct. Each of the largest PBMs own mail order pharmacies and specialty pharmacies.
- *Anticompetitive exploitation of competitively sensitive information.* Because the major health insurers and PBMs necessarily have information on the reimbursement rates paid to pharmacies and other providers in their networks, the vertical integration of competing providers creates the opportunity for this confidential information to be exploited to gain an unfair competitive advantage, which cannot be fully addressed through firewalls.

We commend the agencies for recognizing these and other potential sources of competitive harm from vertical transactions; however, the Draft Guidelines fail to incorporate these scenarios and concepts as the legal basis for actionable vertical merger decisions and *enforcement*. The agencies have considered these principles in recent merger investigations,⁷ but in practice, the agencies have rarely pursued these theories to meaningfully investigate or challenge transactions that are likely to cause significant anticompetitive harm. Given the anticompetitive harm that has been caused from unchecked consolidation in the healthcare industry, we believe that a more forceful overhaul of vertical merger enforcement policy is warranted.

Our organizations ask the agencies to rigorously scrutinize claimed efficiencies from vertical mergers, including whether any efficiencies will be passed on to consumers. As several antitrust scholars have observed, one of the primary explanations for the agencies' lax approach to vertical mergers has been the *assumption* that vertical mergers generally yield significant procompetitive efficiencies.⁸ Although the Draft Guidelines state that the agencies will evaluate

⁷ See, e.g., Statement of Chairman Joseph F. Simmons, Commissioner Noah Joshua Phillips, and Commissioner Christine S. Wilson Concerning the Proposed Acquisition of Essendant, Inc. by Staples, Inc. FTC File No. 181-0180 at 2 (Jan. 28, 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1448328/181_0180_staples_essendant_majority_statement_1-28-19.pdf (considering vertical theories based on raising rivals cost and vertical foreclosure and imposing a firewall to limit anticompetitive exploitation of competitively sensitive information); Statement of Commissioner Rohit Chopra regarding same, available at 3-4: https://www.ftc.gov/system/files/documents/public_statements/1448328/181_0180_staples_essendant_majority_statement_1-28-19.pdf; Trial Brief of the United States, *United States v. AT&T, Inc., DirecTV Group Holdings LLC, and Time Warner, Inc.*, Doc. No. 17-cv-2511, at 3 (D.D.C. March 12, 2018).

⁸ Thomas L. Greaney, The New Health Care Merger Wave: Does the 'Vertical Good' Maxim Apply?, 46 J. Law, Medicine & Ethics at 919-920 (2018); Steven C. Salop, "Invigorating Vertical Merger Enforcement," 127 Yale L.J.

efficiency claims using the approach outlined in the Horizontal Merger Guidelines (§ 8), the Draft Guidelines devote an entire section to the theoretical benefit presumed to result from vertical integration. Without evidence that a proposed merger is likely to generate significant cost savings or other benefits *that will be passed on to consumers*, the agencies should not presume that theoretical efficiencies will offset an otherwise anticompetitive transaction.

Using the CVS Health/Aetna merger as an example, despite claims of enhanced efficiencies and other purported procompetitive benefits, Consumer Reports determined that CVS pharmacies often have the highest retail prices, which were found to be *400% higher* than independent pharmacies' retail prices for the same prescription drugs.⁹ As patients' out of pocket costs and premiums continue to rise, while quality and service levels decline, the agencies need to be as skeptical of efficiencies claims in vertical transactions as they are in horizontal transactions.

Conclusion. We commend the agencies' attention to vertical merger enforcement policy and greatly appreciate the opportunity to share with you our comments on how this policy can be further strengthened.

Sincerely,

Alliance for Pharmacy Compounding
American Pharmacists Association
American Society of Consultant Pharmacists
National Alliance of State Pharmacy Associations
National Community Pharmacists Association

1962, 1962 (2018); *see also* Letter of Diana L. Moss, President, American Antitrust Institute, to Makan Delrahim, Assistant Attorney General, Antitrust Division, United States Dep't. of Justice, Regarding Competitive and Consumer Concerns Raised by the CVS-Aetna Merger at 3 (Mar. 26, 2018), *available at* <https://www.justice.gov/atr/page/file/1132431/download>.

⁹ Lisa A. Gill, Shop Around for Lower Drug Prices, (Apr. 5, 2018), *available at* <https://www.consumerreports.org/drug-prices/shop-around-for-better-drug-prices/>.