



September 18, 2023

The Honorable Lina Khan  
Chair  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

The Honorable Jonathan Kanter  
Assistant Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

**RE: Solicitation for Public Comments**

Dear Chair Khan and Assistant Attorney General Kanter:

The American Pharmacists Association is pleased to submit comments on the Federal Trade Commission's (FTC) and the Antitrust Division of the Department of Justice's (DOJ) [draft update to the merger guidelines](#). APhA strongly supports FTC's and DOJ's update which is necessary to apply to real-world mergers and the harm to competition and choice in the pharmacy benefit manager (PBM) marketplace.

APhA is the largest association of pharmacists in the United States advancing the entire pharmacy profession. APhA represents pharmacists in all practice settings, including community pharmacies, hospitals, long-term care facilities, specialty pharmacies, community health centers, physician offices, ambulatory clinics, managed care organizations, hospice settings, and government facilities. Our members strive to improve medication use, advance patient care, and enhance public health.

**Section I, Guidelines 1-13:**

As you know, the PBM marketplace is [highly concentrated](#) where over three-quarters of all equivalent prescription claims are processed by only three vertically merged

companies, increasing barriers to market entry, raising prescription drug costs, and reducing choice for consumers and purchasers.

The proposed guidelines address horizontal and vertical mergers that reflect the [Biden Administration's competition policy](#) and existing enforcement priorities and provide guidance about the agencies' recent efforts to begin to enforce antitrust and fair competition laws.

Most, if not all, of the proposed 13 guidelines that reflect changes from prior agency guidance have applicability to the PBM marketplace.

### **Section II, 1. Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets**

APhA strongly supports this section's focus on "concentration" to reflect the number and relative size of PBMs competing to offer insured patients access to pharmacies and identify the barriers to competition to the PBMs from smaller, community pharmacies to fill and dispense these same prescriptions for patients. APhA recommends the agencies expand the current definition of "concentration" to account for control of access to the market to eligible patients, as insured patients are generally not able to choose their PBM because of the highly consolidated and vertically integrated PBM marketplace (closed loop market). For example, a recent American Medical Association (AMA) [white paper](#) on vertical and horizontal PBM consolidation found the presence of certain PBMs in the market may not necessarily indicate they are viable options." "Specifically, if PBMs are used exclusively by their affiliated insurer, they may not be viable options for other nonaffiliated insurers to contract with." "[T]he four largest PBMs collectively have a 68% share of the national PBM commercial market," and "the results show little difference in the shares and PBM rankings across functions" involving rebate negotiation, retail network management, and claims adjudication. Essentially, across each of the three product markets—rebate negotiation, retail network management, and claims adjudication—the four largest PBMs had similar collective shares. Accordingly, APhA recommends amending Section II, 1. to account for "concentration," which impacts the ability of competition to affect a closed-loop market.

## **Section II, 5. Mergers Should Not Substantially Lessen Competition by Creating a Firm That Controls Products or Services That Its Rivals May Use to Compete**

APhA supports the agencies' focus in this section and recommends applying it to how the vertically merged PBMs substantially lessen competition by controlling data that its rivals may require to provide services and products to patients. For example, the vertically merged PBMs control access to comprehensive data on patients'/plan enrollees' (claims, bills, payments, and pharmacy interactions across nearly all insurers). Control of this information enables the big three PBMs to foreclose competitors and steer patients to PBM-owned insurance plans, PBMs, and pharmacies (including mail-order and specialty pharmacies). Accordingly, APhA recommends the agencies add a discussion to the draft guidelines on how PBMs' use of such competitively sensitive data can limit the availability of options to consumers and new market entrants.

### **Appendix 3: Details of Market Definition**

As PBMs are not analyzed in the context of "market definition," APhA recommends including a closed-loop analysis, as mentioned above, when it arises in the monopsony context when considering such power in the context of mergers in a vertically closed environment like those forcibly imposed on our nations' pharmacies from the heavily consolidated PBM marketplace.

### **Conclusion**

The proposed guidelines represent a major step forward towards utilizing the tools available to the agencies to consider the larger impact of the highly vertically integrated PBM marketplace on patient choice and market competition. The proposed guidelines provide several potential merger scenarios where the FTC might exercise enforcement powers beyond the scope of the Sherman and Clayton Acts, such as acquisition structures, regulatory jurisdictions, or procurement processes that clearly lessen competition. The FTC has a number of tools under the [Antitrust Procedures and Penalties Act](#) and the Federal Trade Commission Act (FTCA), 28 15 U.S.C. § 45, to initiate a rulemaking to prohibit PBMs from vertically merging with pharmacies due to inherent conflicts of interest. The FTC and DOJ should also bring enforcement actions to prohibit and separate previous healthcare vertical mergers of PBMs that engage in



unfair methods of competition, unfair or deceptive acts or practices in or affecting commerce, or actions that have affected acquisitions not “in the public interest.” In conclusion, APhA strongly supports FTC’s and DOJ’s use of the updated merger guidelines to conduct greater examinations into the acquisition dynamics and acquiring business structures during PBM merger investigations to probe deeper into these mergers to root out unique anti-competitive concerns within the PBM marketplace.

Thank you for the opportunity to provide comments on the FTC’s and DOJ’s draft update to the merger guidelines. APhA looks forward to continuing to work with the FTC and DOJ to return competition to the PBM and healthcare marketplace in order to protect our nation’s community pharmacies, and our patients by promoting healthcare equity and access in our nation’s rural and underserved communities. If you have any questions or require additional information, please contact APhA at [mbaxter@aphanet.org](mailto:mbaxter@aphanet.org).

Sincerely,

*Michael Baxter*

Michael Baxter  
Vice President, Federal Government Affairs