



U.S. Senate, Committee on Commerce, Science & Transportation
Subcommittee on Consumer Protection, Product Safety, and Data Security

Ensuring Fairness & Transparency in the
Market for Prescription Drugs

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Testimony of
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Mr. Chairman and esteemed members of the Subcommittee, I am honored to be here today to address an issue that is causing real pain for consumers and for those trying to help them.

Open and vigorous competition is the backbone of U.S. markets, but we are not seeing that in the pharmaceutical industry. Instead, we see persistently rising prices on the medications people depend on, day after day, to treat widespread problems such as diabetes, high blood pressure, high cholesterol, and opioid addiction.¹ There are many contributors to the rising prices, but a critical place to start is with the industry that sits at the center of everything.

Specifically, at the heart of the drug pricing system lies the industry known as pharmacy benefit managers or PBMs.² Historically, PBMs operated mostly as claims processors, just handling the paperwork flow.³ However, when Medicare expanded in 2006 to include prescription drugs, PBMs took on an expanded role, as well. They began serving as the health plan's representative for negotiating better prices from drug companies.

Although there are many contributing factors, the rise in prices that followed that shift fifteen years ago has been dramatic. Looking, for example, at sixty-five common medicines that need to be taken over a long period of time, prices have almost tripled during those fifteen years.⁴

So how did this happen? How did PBMs—which were supposed to make healthcare *more* efficient—end up helping to inflate drug prices instead? The problem has emerged because rather than act as honest brokers for health plans, PBMs, unsurprisingly, act in their own interests. And it turns out that their own interests are not aligned with keeping prices low. To set the stage for how this works, consider a store that raises the price of a dress before putting the

¹ See CTR. FOR MEDICARE & MEDICAID SERV., FACT SHEET, DRUG SPENDING INFORMATION PRODUCTS (2018), <https://www.cms.gov/newsroom/fact-sheets/drug-spending-information-products-fact-sheet> (listing the ten drugs with highest annual price increases from 2012 to 2016 covered by Medicare); CAL. OFFICE OF STATEWIDE HEALTH PLANNING AND DEVELOPMENT, PREScription DRUG WHOLESALE ACQUISITION COST (WAC) INCREASES (2019) (detailing wholesale price increases of more than 16% for hundreds of drugs between 2017 and Q2 of 2019); Feldman, Devil, supra note 1, at 2.

² For additional information on pharmacy benefit managers, see ROBIN FELDMAN, DRUGS, MONEY, AND SECRET HANDSHAKES: THE UNSTOPPABLE GROWTH OF PRESCRIPTION DRUG PRICES (2019) (discussing the role of PBMs in the pharmaceutical market); Robin Feldman, Perverse Incentives: Why Everyone Prefers High Drug Prices—Except for Those Who Pay the Bills, 57 HARV. J. ON LEG. 303 (2020) (describing the incentive structures that lead PBMs to contribute to rising drug prices); Robin Feldman, The Devil in the Tiers, 8 J.L. & BIOSCI. 1 (2021) (analyzing the role PBMs play in distorting the organization of drug formularies); Robin Feldman, Why Prescription Drug Prices Have Skyrocketed, WASH. POST (Nov. 26, 2018), <https://www.washingtonpost.com/outlook/2018/11/26/why-prescription-drug-prices-have-skyrocketed/> (discussing the role PBMs play in the pharmaceutical market). For a discussion of potential solutions, see Feldman, Devil, at 31–41 (suggesting that drugs should be located on formulary tiers based on list, rather than net, price to remove the incentive for anticompetitive formulary manipulation); FELDMAN, SECRET HANDSHAKES, at 95–102 (describing the significance of transparency and potential state and federal level responses). For an explanation of why prices and price terms negotiated between PBMs and drug companies do not constitute trade secrets, see Robin Feldman & Charles Tait Graves, Naked Price & Pharmaceutical Trade Secret Overreach, 22 YALE J.L. & TECH 61 (2020) (defining trade secrets and discussing PBM efforts to assert that pricing arrangements should be considered trade secrets).

³ Feldman, WASH. POST, supra note 1.

⁴ STEPHEN W. SCHONDELMAYER & LEIGH PURVIS, AARP PUBLIC POLICY INSTITUTE, TRENDS IN RETAIL PRICES OF BRAND NAME PRESCRIPTION DRUGS WIDELY USED BY OLDER AMERICANS, 2006 TO 2020 1–2 (2021).

dress on sale at the old price. When you walk in the store, the sale price looks like a great bargain; but it's not.

PBMs, similarly, have discovered that their best interests are served when drug companies increase the starting price of the drug. That price is known as the list price. If the list price goes up, and the PBM negotiates a rebate back down, the PBM looks more successful. It gets paid more by the health plan, and—because PBMs generally keep part of the rebate—it gets to pocket more.

All of this might not be so bad if no one actually paid that high list price. But people do. Many consumers have what are called high-deductible plans, in which they pay that high list price out of their pocket until they reach a certain threshold⁵; other plans require that patients pay a percentage of the high list price as what is known as co-insurance.⁶ And many Americans still do not have coverage for prescription drugs, even if they have health insurance. Thus, people are often forced to pay the high list price.

I talked before about raising the price of a dress so you can put it on sale at the old price. It gets worse. Imagine if the price jump is higher than the sale discount. That's what is happening in the case of medicine. Prices are rising faster than the rebates are rising. For example, between 2010 and 2017 in Medicare, prices for drugs *after* rebate still rose 313% on average.⁷ We are buying the same dress, but it is costing us more and more. And a significant portion of that increase is going to PBMs.

In addition, despite the fact that PBMs should be serving as honest brokers for health plans, PBMs also take side payments from drug companies for providing services to the drug companies.

And what do the PBMs have in their pocket to offer drug companies to continue this payment stream of rebates and side income? PBMs stand at the center of the system. As well as negotiating prices, they help decide whether a patient will be reimbursed for a particular medicine and how much they will be reimbursed. Therefore, PBMs can agree with a drug company that they will exclude the company's cheaper competitors or make it harder for patients to get the competitor's medicine.⁸ That is of great value to a drug company.

⁵ For an example of a plan requiring that the patient pay 100 percent of the costs of drugs up to a certain limit, see the Anthem insurance plan described at First Am. Consolidated Class Action Compl., at para. 13, In re Express Scripts/Anthem ERISA Litigation, 2018 U.S. Dist. LEXIS 3081 (S.D.N.Y. 2016) (No. 16-3399).

⁶ See Medicare Payment Advisory Comm'n, Report to the Congress: Medicare Payment Policy 408-09 (2017).

⁷ Feldman, Devil, supra note 1, at 19, 21-22.

⁸ See, e.g., Charles Ornstein & Katie Thomas, *Take the Generic, Patients Are Told. Until They Are Not.*, N.Y. TIMES (Aug. 6, 2017) (describing health plans forcing patients to pay more for the generic version of a drug or declining to reimburse for the generic at all, <https://www.nytimes.com/2017/08/06/health/prescription-drugs-brand-name-generic.html?mtrref=undefined> [<https://perma.cc/U4JU-4P3X>]; see also Complaint, Shire U.S., Inc. v. Allergan, Inc., No. 17-7716 (D.N.J. 2017) (alleging bundled rebates for the eye medication Restasis deterred health plan formularies from including competitors); Complaint, Pfizer, Inc., v. Johnson & Johnson and Janssen Biotech, Inc., 2018 U.S. Dist. LEXIS 31690 (E.D. Pa. 2018) (No. 17-4180) (bundled rebates for the rheumatoid arthritis drug Remicade resulted in hospitals and health plan formularies essentially excluding the lower-priced biosimilar).

PBMs and drug companies refuse to disclose the precise size of rebates or the details of the terms given, asserting that the information is a trade secret. Even auditors and regulators are not given full access. Trying to reform the system — or even talk about it — is like shadow boxing.

Finally, the PBM industry is highly concentrated. Just three PBMs control 80%–85% of the market.⁹ They tend to offer the same terms to health plans. Thus, if health plans want something different, they are out of luck.

Markets thrive on information, and when heavily concentrated industries control the flow of information, the end result is rarely in the interests of consumers. Most important, from an intellectual property perspective, simple price and price terms shouldn't be considered trade secrets at all.¹⁰

One cannot overemphasize the major life improvements over the past century that flow from innovation in prescription medications, including new lifesaving antibiotics, treatments for pain, psychopharmacological treatments and cancer drugs. However, if we don't get a handle on the perverse incentives operating in various parts of the drug supply chain, the burden on consumers and taxpayers will continue to be crushing.

Thank you, and I look forward to your questions.

⁹ Neeraj Sood, Dana P. Goldman, & Karen Van Nuys, Follow the Money to Understand How Drug Profits Flow, STAT (Dec. 15, 2017), <https://www.statnews.com/2017/12/15/prescription-drug-profits-pbm/> (“The top three pharmacy benefit managers, which negotiate drug prices on behalf of insurers and self-insured employers, dominate 85 percent of their market.”). See also Neeraj Sood, Transcript of Understanding Competition in Prescription Drug Markets: Entry & Supply Chain Dynamics Workshop (Nov. 8, 2017), https://www.ftc.gov/system/files/documents/videos/understanding-competition-prescription-drug-markets-panel-2/ftc_understanding_competition_in_prescription_drug_markets_-_transcript_segment_3.pdf.

¹⁰ Robin Feldman & Charles Tait Graves, [Naked Price & Pharmaceutical Trade Secret Overreach](#), 22 Yale J.L. & Tech 61 (2020) (discussing PBM efforts to assert that price and price terms should be considered trade secrets).