

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND ACCOUNTABILITY

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March 1, 2023

Adam Kautzner
President
Express Scripts
One Express Way
St. Louis, MO 63121

Dear Dr. Kautzner,

The Committee on Oversight and Accountability is continuing to investigate the role Pharmacy Benefit Managers (PBM) play in pharmaceutical markets. Cigna Express Scripts, along with CVS Caremark and UnitedHealth Group's Optum Rx, are the three largest PBMs and control 80 percent of the PBM market.¹ In Committee Republicans' December 2021 report, we highlighted initial findings that large PBM consolidation has negatively impacted patient health, increased costs for consumers, forced manufacturers to raise their prices, and created conflicts of interest which distort the market and limit high quality care for patients.² This issue remains a top priority while Americans continue to suffer under historically high inflation and rising health care costs. In light of the central role PBMs play in our pharmaceutical markets, we request documents and communications.

PBMs engage in self-benefiting practices at multiple levels of the payment and supply chain as they retain control over drug prices, rebates, pharmacy reimbursements, insurers, pharmacy networks, and formularies.³ PBMs use "fail first" policies which require patients to fail on the PBM's preferred drug before they can take the drug originally prescribed. These policies can worsen patients' health, by forcing them to take medications which do not work for them.⁴ Additionally, lengthy delays for prior authorizations can cause suffering or even death as patients wait for PBMs to approve life-saving medications their doctors prescribe.⁵ PBMs enact these policies to get higher rebates from pharmaceutical manufacturers at the expense of patients. The PBMs also engage in spread pricing, where PBMs pay pharmacies a lower amount than they

¹ Josh Mader, *Pharmacy Benefit Managers: Market Landscape and Strategic Imperatives*, HIRO, (2021).

² H. Comm. on Oversight & Reform, *Staff Report: A View from Congress: Role of Pharmacy Benefit Managers in Pharmaceutical Markets*, 117th Cong. (Dec. 10, 2022).

³ *Pharmacy Benefit Managers and Their Role in Drug Spending*, THE COMMONWEALTH FUND (Apr. 22, 2019); *Pharmacy Benefit Managers*, NAT'L ASS'N OF INS. COMM'RS (Apr. 11, 2022).

⁴ *What is Fail First? And Why it Matters*, FAIL FIRST HURTS.

⁵ Aaron Tallent, *Oncologists Say Prior Authorization is Causing Delays in Care*, OBR ONCOLOGY (Mar. 25, 2022); *What is Prior Authorization*, CIGNA (2021).

charge to a health plan sponsor, such as the government in cases of Medicare and Medicaid, while pocketing the difference.⁶ PBMs also force pharmacies to pay retroactive rebates and fees including Direct and Indirect Remuneration (DIR) fees months or even years later, shifting costs from PBMs to beneficiaries and the government.

Express Scripts appears to be continuing to leverage its size for financial gain. In November 2022, Express Scripts agreed to pay \$3.2 million to settle claims that the company overcharged Massachusetts' workers' compensation insurance system for prescription drugs.⁷ In July 2022, Aids Healthcare Foundation (AHF) sued Express Scripts alleging the company manipulated Medicare star ratings to ensure pharmacies get unfairly low scores, allowing Express Scripts to "claw back" Medicare benefits from pharmacies.⁸ According to AHF, Express Scripts was engaged in 14 different violations across nine states.⁹

Express Scripts also has a pattern of engaging in dubious business practices and kickback schemes. In July 2020, Express Scripts was accused of overcharging the Ohio Highway Patrol Retirement System.¹⁰ The lawsuit stemmed from multiple contract breaches by Express Scripts, including the failure to honor dispensing fee guarantees, pricing discounts, classifying generic drugs as brand drugs to charge higher rates, and overcharging for generic drugs.¹¹ In 2019, another suit was filed against Express Scripts after a whistleblower alleged the company defrauded the federal government and vendors out of billions of dollars through the delivery of unnecessary prescription drugs to military personnel.¹²

In May 2015, Medco Health Solutions Inc., a subsidiary of Express Scripts, agreed to pay the government \$7.9 million to settle allegations that it engaged in a kickback scheme, violating False Claims Act.¹³ In the same year, Express Scripts agreed to pay \$60 million to settle allegations of its participation in *another* kickback scheme with Novartis AG to boost sales of a drug that led to improper government reimbursements.¹⁴ In 2008, Express Scripts settled for \$9.5 million to resolve consumer protection claims with 28 states and Washington, D.C.¹⁵

⁶ *Spread Pricing 101*, NAT'L CMTY PHARMACISTS ASS'N.

⁷ Brendan Pierson, *Express Scripts to Pay \$3.2 Mln to Settle Massachusetts Overcharge Claims*, REUTERS (Nov. 7, 2022).

⁸ Paige Minemyer, *AIDS Healthcare Foundation Sues Express Scripts over Medicare 'Clawbacks'*, FIERCE HEALTHCARE (Jul. 14, 2022).

⁹ *Id.*

¹⁰ Samantha Liss, *Express Scripts Faces Lawsuit Alleging it Overcharged Ohio Public Pension Fund*, HEALTHCARE DIVE (Jul. 15, 2020); Paige Minemyer, *Ohio AG Sues Express Scripts to Reclaim Drug Overcharges*, FIERCE HEALTHCARE (Jul. 15, 2020).

¹¹ *Id.*, Liss.

¹² *Around the nation: Lawsuit Alleges PBM's 'Refill Pill Mill' Defrauded Government*, ADVISORY BOARD (Jun. 23, 2022); *PBM Faces Suit Over Alleged 'Refill Pill Mill' Scheme*, NAT'L CMTY PHARMACISTS ASS'N (Jun. 29, 2022).

¹³ U.S. Dep't of Justice, Press Release, *Medco to Pay \$7.9 Million to Resolve Kickback Allegations* (May 20, 2015).

¹⁴ Nate Raymond, *Express Scripts to Pay \$60 Mln Over Novartis Kickbacks, U.S. Says*, REUTERS (May 1, 2015).

¹⁵ Wash. State Off. of the Att'y Gen., Press Release, *Attorney General McKenna Announces Express Scripts to Pay \$9.5 Million to Resolve Consumer Protection Claims* (May 27, 2008).

The focus of the pharmaceutical marketplace should be on the patient. Greater transparency is needed to determine the impact PBM tactics are having on patients and the pharmaceutical market. To assist the Committee to further understand the role of PBMs in pharmaceutical markets, please provide the following documents and information no later than March 15, 2023:

1. All documents and communications related to formulary design and management relating to:
 - a. Commercial plans;
 - b. Medicare;
 - c. Medicaid;
 - d. Federal Employee Health Benefit Program;
 - e. TRICARE; or
 - f. The Department of Veteran's Affairs;
2. A list of individuals involved in the design and management of formularies;
3. A list, by year, of all rebates or fees paid to Express Scripts by:
 - a. Manufacturers of one or more prescription drugs;
 - b. Wholesale drug distributors licensed by any state or entity of the state; or
 - c. Pharmacies licensed by any state or entity of the state;
4. All documents and communications related to:
 - a. Differences in pricing between government programs and commercial plans;
 - b. "Rebate guarantees," defined as guaranteeing a specific amount of rebates to a plan sponsor;
 - c. Drug discount cards;
 - d. Incentives or encouragement of a patient to use a pharmacy owned by Express Scripts or related entities;
 - e. Patient adherence metrics, including but not limited to how the metrics are created and applied to pharmacies;
5. All documents and communications related to the Group Purchasing Organization called Ascent Health Solutions (Ascent), including but not limited to:
 - a. Ascent's relationship with Express Scripts and Cigna;
 - b. Conflicts of interest between Cigna, Express Scripts, and Ascent;
 - c. Priorities given to Cigna-owned or preferred entities;
 - d. Services Ascent offers to manufacturers and rebate negotiations with manufacturers;
6. All contracts, documents, and communications between Express Scripts and:

- a. Blue Cross BlueShield;
 - b. Centene Corporation; and
 - c. Humana Inc.;
7. All contracts between Express Scripts with entities or programs within or subsidized by the Federal Government, including but not limited to:
 - a. Medicaid;
 - b. Medicare;
 - c. The Centers for Medicare and Medicaid Services;
 - d. The Office of Personnel Management;
 - e. The Defense Health Agency; or
 - f. The Department of Veteran's Affairs;
8. All documents or communications, including but not limited to letters or notices from or on behalf of Express Scripts, related to any removal or threat of removal from any Medicare Part D network based upon:
 - a. The raising of a dispute or making any comment regarding the legality, propriety, or other legal deficiency in connection with the PBM or Plan Sponsor's Medicare Part D networks;
 - b. The filing or communication of intent to file any legal action against Express Scripts or its related entities;
 - c. The filing or communication of the intent to file an application in any state or federal court to confirm any arbitration award rendered against Express Scripts or its related entities;
9. Any interim or final arbitration award, court opinion, order, or judgment finding Express Scripts or its related entities violated Medicare Part D "Any Willing Provider Law" (42 U.S.C. § 1394w-104(b)(1)(A), 42 C.F.R. § 423.505(b)(18));
10. All documents and communications related to fees charged by Express Scripts to pharmacies owned by CVS Health, UnitedHealth Group, or Cigna Express Scripts Inc., including but not limited to;
 - a. Direct and Indirect Remuneration (DIR) fees;
 - b. Network Access fees; or
 - c. Data sharing fees
11. All policies and procedures relating to the payment for and distribution of specialty medications within Express Scripts, including policies and procedures which encourage or incentivize patients to receive specialty medications from a Cigna-owned or preferred entity; and

Adam Kautzner

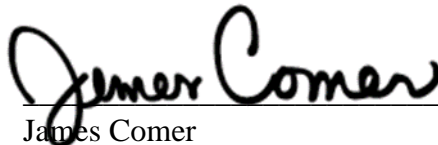
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12. All policies and procedures related to the purchase or the determination of an offer to purchase a competing pharmacy.

Thank you for your consideration of this important issue. To make arrangements to deliver documents or ask any related follow-up questions, please contact Committee on Oversight and Accountability Majority Staff at (202) 225-5074. The Committee on Oversight and Accountability is the principal oversight committee of the U.S. House of Representatives and has broad authority to investigate “any matter” at “any time” under House Rule X. Thank you in advance for your cooperation with this inquiry.

Sincerely,

A handwritten signature in black ink that reads "James Comer". The signature is written in a cursive style with a horizontal line underneath the name.

James Comer

Chairman

Committee on Oversight and Accountability

cc: The Honorable Jamie B. Raskin, Ranking Member
Committee on Oversight and Accountability