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ACPCN To Congress: Review FTC Failures in Prescription Drug Market

The Federal Trade Commission is Uninformed About PBM Practices That Destroy Competition

Washington, DC—April 3, 2012—The Association of Community Pharmacists Congressional Network (ACPCN) testified at a March 29 hearing by the House Subcommittee on Intellectual Property, Competition, and the Internet that independent U.S. pharmacies lack any trust in the Federal Trade Commission to protect their rights. The hearing focused on HR 1946, a bill that would allow independent pharmacies to negotiate together with pharmacy benefit management companies (PBMs).

ACPCN Vice President for Government Affairs, Mike James, a pharmacist who owns Person Street Pharmacy in Raleigh, NC, encouraged the subcommittee to carefully question testimony by FTC Director for the Bureau of Competition, Richard Feinstein. Though Director Feinstein raised no objections to the merger by Express Scripts and Medco, the two largest PBMS that together control roughly 40% of all U.S. prescriptions, he opposes HR 1946 because it allows two or more independent pharmacies to negotiate together against them.

Who Controls the U.S. Prescription Drug Market?

The largest PBMs now control 85% of every U.S. prescription, compared to just 10% of prescriptions a few years ago. This exceptional market power allows the PBMs to set prescription prices, use non-negotiable agreements to impose anti-competitive terms on pharmacies that compete against them, and use confidential patient data that moves through their systems to steer patients into pharmacies and mail programs the PBMs own, and drug products in which the PBMs have financial interests.

“The FTC has lost credibility with 22,000 small business pharmacies across the country,” stated James. “Director Feinstein’s testimony offers no data to back his broad theories, and makes clear his total failure to understand the abuses we have brought to his attention.”

The FTC Fails to Grasp Fundamentals of Prescription Pricing

James questioned Director Feinstein’s testimony that allowing independent pharmacies to negotiate collectively would increase prescription prices. He provided the subcommittee with a report from Park West Pharmacy in Little Rock AR on payments it received from PBMs for 218 prescriptions the pharmacy filled between January 1 and the date of the hearing. In each case, the PBMs intentionally paid the pharmacy less than the cost of the drugs, resulting in nearly \$1,900 in losses.

“Forcing PBMs to pay Park West Pharmacy what they owe would not increase prices, it would reduce PBM profits--that’s a big difference,” stated James. “If the FTC cannot figure this out, Congress is the only remaining option to end these abuses.”

ACPCN member Renardo Gray, owner of Westside Pharmacy of Detroit in Michigan explained how Caremark, a PBM that owns CVS pharmacies, pays its pharmacies in full when they fill prescriptions. Gray asked the committee, “How is this system fair when PBMs that control consumer prices pay me less to fill the same prescriptions, just because I am in competition with their pharmacies—where is the FTC?”

ACPCN members have complained to the FTC that PBMs use their market power to unlawfully undermine competitors, prevent pharmacies they do not own from offering similar services, and hide price information from patients and their insurance plans. ACPCN wants Congress to pass legislation that will allow independent pharmacies to compete against PBM-owned pharmacies and mail-service programs.

The FTC Has Made No Effort to Offer Solutions

ACPCN especially stressed deep frustration over the fact that Director Feinstein's only contribution to the hearing was to provide recycled testimony that referenced outdated or irrelevant FTC reports. He cited opinions by the Antitrust Modernization Commission from 2007, a 2009 study of competition for biologic drugs, two general studies from 2004 and 2005, and general staff comments presented to a state legislature.

"Did a single reference in the FTC testimony offer any data to support the blanket statement that HR 1946 will raise prices?" James asked the subcommittee. "No--the FTC has opinions, but not facts."

HR 1946 Will Impact PBM Profits, Not Prices

Professor Joshua Wright of George Mason University told the subcommittee HR 1946 would cost \$30 billion over 10 years, according to a James River Associates report in 2007. ACPCN pointed out that his testimony offered no other data of any kind, that Professor Wright failed to disclose he was previously an employee at James River Associates, and that the report was based on HR 971, a previous version of HR 1946 in the last Congress that included the Medicare Part D program. By comparison, the Congressional Budget Office told the subcommittee in a hearing on HR 971 in the previous Congress that it would result in a total cost of only \$70 million over 10 years.

"Professor Wright did not bother to reference the CBO report, and did not bother to notice that HR 1946 strips out the Medicare Part D coverage," according to James. "Congress should waste no time looking for anything insightful in his testimony."

ACPCN challenged the FTC and the PBM industry to produce any data to prove HR 1946 would result in price increases instead of cost shifting from pharmacies to PBMs.

"Tremendous pressure on PBMs by insurance providers will always be the safeguard against price increases, regardless of what independent pharmacies are able to negotiate with the PBMs," James stated. "HR 1946 will let independent pharmacies take back some of those profits with no impact on insurers or consumers--it's as simple as that."

More information, including testimony by Mr. James and Mr. Gray, is available at www.ACPCN.org.

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About ACP*CN

The Association of Community Pharmacists Congressional Network is based in Washington, DC and includes thousands of independent pharmacists nationwide. ACP*CN is dedicated to improving pharmacy competition for the benefit of millions of consumers by providing community-based access to pharmacy services. For more information visit www.acpcn.org.