

ALERT

FTC Votes to Examine PBM Practices

June 24, 2022

On June 16, 2022, the Federal Trade Commission (FTC or Commission) unanimously voted to authorize its examination under Section 6(b) of the FTC Act of anti-competitive behavior of Pharmacy Benefit Managers and other intermediaries (collectively PBMs). The Commission is particularly concerned that PBMs' efforts to realize maximum levels of manufacturer-paid rebates and fees (some or all of which are retained by the PBM) result in PBMs preferring higher cost, brand (*i.e.*, patented) drug products on their formularies. The Commission is concerned that such PBM and manufacturer practices diminish the competitive market effect that lower-cost biosimilars and generic drugs would otherwise be having on overall drug pricing.

Lina Kahn, FTC Chair, questioned whether the current rebates and fee practices between PBMs and manufacturers may be legally impermissible under Section 3 of the Clayton Act, Section 5 of the FTC Act, and the Robinson-Patman Act. Should the Commission determine that impermissible and anti-competitive PBM and manufacturer practices exist vis-à-vis rebates, fees, or otherwise, Chair Kahn emphasized that the Commission's existing, and long-standing, authority may have sufficient reach to prohibit such industry conduct. The bipartisan proposed Pharmacy Benefit Manager Transparency Act of 2022 would further enhance the FTC's oversight and enforcement authority.

The Commission, on June 6, 2022, issued compulsory orders to the six largest PBM entities requiring information and records on their business practices. Responses are expected to be filed to the Commission on September 4, 2022. Wiley will continue to monitor the Commission's activity.

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Practice Areas

FTC and Consumer Protection
Health Care
Pharmacy Benefit Manager (PBM)
Contracting

Wiley's Health Care practice has extensive experience helping health plan, third party administrator, and managed care clients navigate their contractual relationships with PBMs. For more information about PBM rebates, please contact one of the attorneys listed in this alert.