Statement for the Record: The National Community Pharmacists Association (NCPA)

United States House Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Hearing: "Competition in the Pharmaceutical Supply Chain: The Proposed Merger of CVS Health and Aetna"

February 27, 2018

Chairman Marino and Ranking Member Cicilline, and Members of the Subcommittee:

Thank you for conducting this hearing on competition in the pharmaceutical supply chain and on the pending merger of CVS Health and Aetna Inc. that is currently under review at the Antitrust Division of the Department of Justice ("DOJ"). NCPA represents America's community pharmacists, including the owners of more than 22,000 independent community pharmacies. Together they represent an $80 billion healthcare marketplace and employ more than 250,000 individuals on a full or part-time basis. These pharmacies dispense approximately 40% of all community pharmacy prescriptions and are often located in underserved rural or urban areas.

In this statement, NCPA will highlight how increased consolidation in the healthcare industry may be contributing to higher costs and negatively impacting patient choice. NCPA will also address several potential issues and pose questions related to the CVS Health/Aetna Inc. merger and the broader implications on the healthcare industry. NCPA recommends that the proposed merger between CVS Health and Aetna Inc. be closely examined to determine whether this transaction will lead to lower quality/fewer options for patients, higher costs, and less competition in the healthcare market.

Potential Implications on Pharmacy Choice for Patients

The proposed CVS Health/Aetna Inc. merger raises several questions regarding its impact on pharmacy choice for patients. A recent Council of Economic Advisers, *Reforming Biopharmaceutical Pricing at Home and Abroad,* found that just three pharmacy benefit managers ("PBMs") account for 85% of the market.[1] CVS Caremark, the PBM business for CVS Health, is the second largest PBM in the U.S., covering approximately 34% of covered lives.[2] This significant market share allows CVS Caremark (as well as the other largest PBMs) to exercise undue market leverage and generate outsized profits for themselves. Community pharmacies have very little negotiating power when contracting with PBMs like CVS Caremark, and routinely must agree to take-it-or-leave-it contracts to be a part of the PBM's pharmacy network. In some cases, even if a pharmacy is willing to accept onerous contract terms, the PBM will exclude certain pharmacies from their networks altogether, limiting patient choice. Aetna,

[1] Council of Economic Advisers, *Reforming Biopharmaceutical Pricing at Home and Abroad*, Feb. 2018, *available at* https://www.whitehouse.gov/wp-content/uploads/2017/11/CEA-Rx-White-Paper-Final2.pdf.

[2] According to CVS Health, it has 90 million PBM plan members. *See* CVS Health, *available at* https://cvshealth.com/about/facts-and-company-information. The Pharmaceutical Care Management Association testified that PBMs administer drug plans for more than 266 million Americans. *See* Testimony of Mark Merritt, Pharmaceutical Care Management Association, before the United States House of Representatives Energy and Commerce Committee Subcommittee on Health, "Examining the Drug Supply Chain," Dec.13, 2017.

for which CVS Caremark administers the pharmacy benefit, has already engaged in this practice as the 2018 plan year marks the second consecutive year that many independent pharmacies were excluded from the opportunity to bid for preferred status in Aetna's Part D pharmacy networks. Having the opportunity to be a part of a plan's preferred network is critical, as nearly all Part D plans in 2018 include preferred networks that offer lower co-pays to beneficiaries in exchange for lower reimbursement to the pharmacy. Additionally, the opportunity to be in preferred networks allows pharmacies to evaluate a potential benefit of increased volume of consumers from those preferred network patients.

Indeed, Aetna has already engaged in problematic practices with respect to its pharmacy networks. CMS sanctioned the company in 2010[3] and again in 2015[4] for misleading seniors about which pharmacies were in-network. According to CMS:

> *Aetna reported that a total of 6,887 non-network retail pharmacies were erroneously identified by Aetna as "retail in-network" for 2015 on its website and through its call center customer service representatives during the calendar year 2015 Annual Election Period. Beneficiaries that selected a plan based on its in-network pharmacies may have been misled by this incorrect information.*
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> *The confusion created by errors in Aetna's pharmacy network directory on their website led to disruption in the marketplace. After January 1, 2015, many Aetna enrollees presented with a prescription at their usual pharmacy only to discover that the pharmacy was not in their plan's network. These enrollees complained because they either had to pay cash at the point of sale for their prescription (and seek subsequent repayment from Aetna) or to leave the pharmacy without their drug. Aetna's complaint rates for Part D issues were five times greater than the complaint rate for all MA-PD and PDP parent organizations.*
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> *Aetna's 3,767 complaints accounted for 33 percent of all complaints received by CMS. Of those complaints, 2,750 (73 percent) were marketing complaints that beneficiaries were misled about in-network pharmacy coverage.*

Merging a pharmacy/PBM with a health plan will only solidify problems with respect to pharmacy access issue especially in underserved areas. PBMs like CVS Caremark already direct or incentivize patients into certain pharmacies based on prescription benefit design. For example, the PBM can create a design that offers patients a lower co-pay at their own mail order pharmacy or retail stores than at the community pharmacies with which it contracts. An entity that controls the healthcare benefit as well as the prescription drug benefit will give consumers even less control over their choice of healthcare providers.

The Department of Justice should closely examine whether this transaction -- that will create a vertically integrated health plan, pharmacy benefits manager, and pharmacy chain -- will result in substantial access issues for patients who want to continue to use their local community

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[3] Manos, Diana, Healthcare Finance, *CMS issues sanctions against Aetna*, Apr. 12, 2010, *available at* http://www.healthcarefinancenews.com/news/cms-issues-sanctions-against-aetna.

[4] CMS, *Notice of Imposition of Civil Money Penalty for Medicare Advantage-Prescription Drug and Prescription Drug Plan Contract*, Apr. 16, 2015, *available at* https://www.cms.gov/Medicare/Compliance-and-Audits/Part-C-and-Part-D-Compliance-and-Audits/Downloads/AetnaCMP4162015.pdf.

pharmacy or existing healthcare providers. CVS Health operates the largest pharmacy chain in the United States with approximately 9,700 retail locations and has significant share in many markets. Will the merged entity be able to use their dominant position to increase payments to CVS pharmacies? Conversely, will health plan competitors foreclose CVS pharmacies from their plans?

For example, will Aetna adopt a plan design that only allows Aetna customers to access CVS' Minute Clinics (or raise costs to competitors who want access to the clinics for their beneficiaries)? Will Aetna direct patients into CVS Minute Clinics rather than the healthcare provider of their choice? Will those patients also be incented to use the CVS pharmacy where the Minute Clinic is located, leaving the patient with little choice in where they receive their healthcare?

The Department of Justice should also examine whether Aetna will require or strongly incentivize patients to use CVS Health's mail order and/or specialty pharmacies. Forcing patients, particularly those that have more complex conditions that require specialty drugs, to get their prescriptions from a pharmacy with which it has no personal relationship severely limits patients' choice and may impact the quality of care and adherence. Will this transaction force more patients to use CVS retail or mail order pharmacies despite a preference by consumers to use their pharmacies of choice?

NCPA is not alone with concerns about patient access. Recently, several HIV/AIDS patients sued CVS Health, alleging the pharmacy leveraged insurance laws to force patients to fill their prescriptions at CVS pharmacies or CVS Health's mail order company.[5] If the patient chose to obtain their prescription drugs from a different pharmacy, the patient faced thousands of dollars in costs to obtain the drugs. Patients reported a number of other issues with patients being forced into using one pharmacy provider, including that a patient who received drugs from CVS' mail order program, had his drugs left outside his home, "baking in the afternoon sun."[6] NCPA has also received over a hundred photographs of mail order waste from CVS and other mail order pharmacies in which millions of dollars of unwanted prescription drugs have been sent to consumers. These consumers seek out their local pharmacists' help in disposing these unnecessary and often costly drugs.[7]

Thus, there are serious questions as to whether patients will continue to have access to their preferred pharmacies and other healthcare providers and whether quality and service will be negatively impacted to the detriment of patients.

Potential Implications on Patients' Healthcare Costs

The merging parties have stated that the proposed transaction will create efficiencies and save hundreds of millions of dollars for consumers. They have not, however, explained whether those purported savings will be passed on to consumers. The largest PBMs already claim their size

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[5] Herman, Bob, Axios, *HIV patients sue CVS over pharmacy networks*, Feb. 21, 2018, *available at* https://www.axios.com/cvs-pharmacy-lawsuit-hiv-1519160365-c6f5527a-f5f2-429d-b817-6a9ea321335d.html; *see also John Doe One et al. v. CVS Health Corporation*, Case No. 3:18-cv-1031, N.D. Cal. (filed Feb. 16, 2018).
[6] *Id.*
[7] NCPA, *Waste Not, Want Not*, *available at* https://www.ncpanet.org/pdf/leg/sep11/mail_order_waste.pdf.

enables them to achieve significant efficiencies and cost savings. As patients' out of pocket costs and premiums continue to rise, there is evidence to suggest that these savings are not, in fact, being passed on to consumers. Will savings from this merger be passed along? Did the 2012 merger of PBMs Express Scripts and Medco result in consumer savings? NCPA suggests the answers to these questions remains unclear but warrant careful consideration by the Department of Justice.

As discussed above, many patients that visit CVS Minute Clinics are likely to pick up their drugs at the CVS pharmacy. NCPA questions whether picking prescription drugs up at a CVS will result in lower costs? Will CVS use the proximity of its store locations within its Minute Clinics to extract higher payments from healthcare plan sponsors?

In addition, will the combined company force more mail order on patients who often pay more for costlier drugs in the mail order program? It is a common misconception that steering patients into mail order will lower drug costs for consumers.[8] Evidence demonstrates that mail order pharmacies consistently dispense costlier brand-name drugs and fewer generics than retail pharmacies. As a "price giver" and a "price taker," mail order firms can manipulate pricing schemes. Plan Sponsors (employers, the federal government, individual purchasers) are often misled into thinking their overall prescription drug costs will be lowered by moving to mail order. At the end of the day, a shift to more mail order will lower the rate of generic dispensing, ultimately raising drug costs. In comparison, community pharmacies dispense generics 88% of the time.

General Questions that Arise from the Merger

Finally, NCPA would like to highlight several additional questions about the proposed merger:

- Will a combined CVS/Aetna limit selling its PBM services to certain health plans or conversely, will health insurance payers exclude CVS/Aetna from its pharmacy network or as its PBM?
- Will the deal essentially "cut out" one of the big 3 PBMs therefore lessening bidding intensity by PBMs offering their services to health plans?
- Will the deal create a potential horizontal issue by eliminating existing CVS Caremark/Aetna bidding competition in the market for provision of PBM services to non-health insurer plan sponsors, including employers and unions?

Conclusion

As the healthcare system continues to consolidate, healthcare costs continue to increase, and patients have fewer choices. Members of this subcommittee should be concerned with this trend and encourage close examination of the CVS Health/Aetna merger to determine whether the transaction will result in significant anticompetitive effects. Thank you for considering NCPA's concerns.

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[8] *A Comparison of the Costs of Dispensing Prescriptions through Retail and Mail Order Pharmacies*, *available at* http://www.ncpanet.org/pdf/leg/feb13/comparison_costs_dispensing_prescriptions_retail_mail_order.pdf.