



September 29, 2021

Richard Powers
Acting Assistant Attorney General
Antitrust Division
U. S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Dear Acting Assistant Attorney General Powers,

Thank you for the Department of Justice's ("DOJ") additional scrutiny of the proposed acquisition of Change Healthcare by United Health Group ("UHG") and the proposed combination of Change Healthcare and Optum, a UHG subsidiary that describes itself as a diversified health services company. American Pharmacy Cooperative ("APCI") is aware that the DOJ has heard from the American Antitrust Institute¹ and the American Hospital Association² regarding concerns of the anti-competitive effects of the proposed acquisition. APCI shares these concerns. However, APCI, consisting of more than 1,700 community pharmacies across thirty states, believes it is important that the DOJ, and indeed, the nation hear the unique perspective of community pharmacy regarding the potential dangers to competition the proposed acquisition poses.

Community Pharmacies have suffered anticompetitive harms as a result of healthcare consolidation and PBM practices.

Community pharmacists are not only front-line providers, caring for patients in bustling metropolises, suburbs, and rural America alike, but they do so while at the mercy of Pharmacy Benefits Managers (PBMs). PBMs administer prescription drug benefits on behalf of payers, forming networks, designing formularies, and setting rates for pharmacy reimbursement. In addition to performing those core functions, large PBMs, through subsidiary and affiliate pharmacies, also compete with unaffiliated pharmacies including community pharmacies, through PBM owned/affiliated mail order, specialty, and sometimes retail pharmacies.

Further exasperating the headwinds that community pharmacists face trying to care for patients and improve patient outcomes while they are at the mercy of PBM competitors when it comes

¹ American Antitrust Institute, letter to Acting Assistant Attorney General Richard Powers, May 5, 2021, available online at https://www.antitrustinstitute.org/wp-content/uploads/2021/05/AAI-Ltr-to-DOJ_UHC-CHNG_5.5.21.pdf.

² American Hospital Association letter to Acting Assistant Attorney General Richard Powers, March 17, 2021, available online at <https://www.aha.org/system/files/media/file/2021/03/aha-urges-doj-investigate-unitedhealth-groups-acquisition-change-healthcare-letter-3-18-21.pdf>.

to network access and prescription drug reimbursement, is the fact that pharmacy benefits management is a deeply consolidated industry.

More specifically, approximately 77% of the prescription drugs administered in this country are administered by the three largest PBMs, one of which is Optum.³ Simply put, the largest PBMs are directly, or through their parent companies, amongst the largest companies in the world and there have been several acquisitions in the PBM industry that have resulted in significant consolidation.⁴

Community pharmacy has seen and felt firsthand the anticompetitive effects of industry consolidation and vertical integration in the prescription drug market and those effects include inefficiency, poorer patient outcomes, and increased prices by way of arcane trade secreted reimbursement methodologies, restrictive rebate practices that do not pass savings back to patients at the drug counter and exclude medications from formularies, and patient steering to PBM owned/affiliated pharmacies.

While community pharmacy has long been one of the few voices on this issue, that is beginning to change and even the FTC seems to acknowledge that consolidation and vertical integration has empowered PBMs to engage in anticompetitive practices:

The FTC and Congress must take concrete steps to address the conflicts of interests embedded in the structure of the PBM industry. In addition to problematic rebating practices, we must also examine whether PBMs are engaged in coercive practices that harm patients, independent pharmacists, and public health. In addition to legislative efforts, it will be critical for the FTC to rethink its approach of bringing individual enforcement actions, since this strategy is unlikely to combat these problems in a timely fashion.⁵

As more fully elaborated below, APCI is deeply concerned that allowing the proposed acquisition of Change Healthcare is likely to create more conflicts of interest, reduce competition, and lead to greater inefficiencies in an already inefficient and flawed system.

³ Adam J. Fein, Ph. D., "The Top Pharmacy Benefit Managers of 2020: Vertical Integration Drives Consolidation," Drug Channels, April 6, 2021, available online at <https://www.drugchannels.net/2021/04/the-top-pharmacy-benefit-managers-pbms.html>.

⁴ See 2021 Fortune 500 list available online at <https://fortune.com/fortune500/>; See also CVS Health, November 28, 2018, CVS Health Completes Acquisition of Aetna . . . [Press release], available online at <https://cvshealth.com/news-and-insights/press-releases/cvs-health-completes-acquisition-of-aetna-marking-the-start-of>; See also Cigna, December 1, 2018, Cigna completes combination with Express Scripts . . . [Press release], available online at <https://newsroom.cigna.com/Cigna-Completes-Combination-with-Express-Scripts-Establishing-a-Blueprint-to-Transform-the-Health-Care-System>.

⁵ Statement of Commissioner Rohit Chopra Regarding the Commission's Report on Pharmacy Benefit Manager Rebate Walls, May 28, 2021, available online at https://www.ftc.gov/system/files/documents/public_statements/1590528/statement_of_commissioner_rohit_chopra_regarding_the_commissions_report_on_pharmacy_benefit_manager.pdf.

The proposed acquisition of Change Healthcare raises horizontal anti-competitive concerns as it will eliminate direct competition between Optum and Change Healthcare.

Change Healthcare is an independent healthcare technology company offering a suite of software and analytics, technology enabled services and network solutions that it maintains enhances clinical decision making, simplifies billing, collection, and payment processes, and enables a better patient experience.⁶

While Change Healthcare is independent, i.e. not owned by an insurer, managed care company, PBM, or provider, it is no small player in its field. Indeed, it is massive, with its Intelligent Healthcare Network having facilitated over 15 billion transactions and approximately \$1.5 trillion in adjudicated claims in the 2020 fiscal year alone.⁷ Put another way, Change Healthcare has facilitated over one-third of all U.S. healthcare expenditures with its customer base including:

- 2,400 government and payer connections;
- 1,000,000 physicians;
- 125,000 dentists;
- 39,000 pharmacies;
- 6,000 hospitals; and
- 700 laboratories.⁸

UHG describes Optum as a technology-enabled health services company who, like Change Healthcare, serves providers including physicians, pharmacies, hospitals, and other healthcare facilities.⁹

Like Change Healthcare, Optum serves commercial payers including employers and health plans, as well as governmental payers such as state, federal, and municipal agencies.¹⁰ Optum operates three business segments:

- OptumHealth (care delivery, care management, wellness and consumer engagement, and health financial services);
- OptumInsight (data analytics, research, consulting, technology and managed services solutions); and
- OptumRx (array of pharmacy care services including pharmacy benefits management services and the operation of specialty and mail order pharmacies).¹¹

As more fully elaborated below, because Optum and Change Healthcare are both major players in the healthcare technology fields, APCI believes the proposed acquisition of Change

⁶ Change Healthcare, Inc., Annual Report and Form 10k 2020, p. 1, available online at

<https://www.annualreports.com/Company/change-healthcare-inc>.

⁷ Id.

⁸ Id.

⁹ UHG, Form 10k 2020, p. 2, available online at

<https://www.unitedhealthgroup.com/viewer.html?file=/content/dam/UHG/PDF/investors/2020/UNH-Form-10-K.pdf>

¹⁰ Id.

¹¹ Id.

Healthcare will result in the removal of direct competition and is likely to have anti-competitive effects.

The proposed acquisition of Change Healthcare would directly result in the loss of competition and increased market concentration.

For horizontal merger analysis purposes, Change Healthcare and OptumInsight are not only major players in the analytics and technology services market, but they are also competitors. As noted above, both are healthcare technology companies servicing clients in many of the same market channels including healthcare providers, hospitals, commercial payers, and governmental payers.

A review of their respective filings and websites reflects a redundancy of services including but not limited to revenue cycle management, payment accuracy, healthcare data and analytics, provider payment services, value-based care, provider network management, and pharmacy solutions.¹²

Because of the redundancy of markets and services combined with the sheer number of healthcare transactions the respective companies touch, the proposed acquisition will reduce substantial head-to-head competition, result in significant consolidation in the healthcare technology market and as such the potential adverse effects resulting directly from the loss of competition deserves scrutiny.¹³

The proposed acquisition of Change Healthcare is likely to lessen competition by eliminating an independent maverick firm that plays a disruptive role in the market.

Change Healthcare is an independent maverick firm and the proposed acquisition by UHG would compromise its independence and likely harm competition via eliminating a “maverick firm,” and market disruptor.

Specifically, Change Healthcare, in its filings, has made a point to note that it is a “independent,” healthcare technology company.¹⁴ This independence comes from it not being owned by a payer or provider.

¹²<https://www.changehealthcare.com/>; see also <https://www.optum360.com/solutions/coding-and-documentation/codebooks-and-training/chargemaster-solutions-demo.html>; see also <https://www.optum.com/business/solutions/health-plans/claims-payment-accuracy.html>; see also <https://www.optum.com/business/resources/analytics-and-healthcare.html>; see also <https://myservices.optumhealthpaymentservices.com/registrationSignIn.do>; see also <https://www.optum.com/business/resources/advisory-insights/thinking-value-based.html>; see also <https://professionals.optumrx.com/services/pbm.html>.

¹³ Change Healthcare’s solutions revenue was \$1.89 billion for the last reportable fiscal year while OptumInsight’s revenue for 2020 was \$10.8 billion. See Change Healthcare, Inc., Form 10k 2020, p. 72, available online at <https://ir.changehealthcare.com/node/8066/html>; See also UHG, Form 10k 2020, p. 38, available online at <https://www.unitedhealthgroup.com/viewer.html?file=/content/dam/UHG/PDF/investors/2020/UNH-Form-10-K.pdf>.

¹⁴ Change Healthcare, Inc., Form 10k 2020, p. 69 and 98, available online at <https://ir.changehealthcare.com/node/8066/html>.

Its independence is, according to Change Healthcare's own admission, central to its ability to compete:

[Change Healthcare] competes on the basis of . . . ***the alignment it has with its customers due to not being owned by a payer or provider organization*** . . . (emphasis added).¹⁵

In an industry as consolidated and vertically integrated as the healthcare industry is, independence of a company performing the breadth of services Change Healthcare performs goes beyond mere "alignment," and becomes a central selling point. The implications of its loss of independence should it be acquired by UHG will likely not be lost upon Change Healthcare's clientele. Its independence goes well beyond mere alignment with customers, and as Change Healthcare itself has acknowledged:

We may not be able to retain current customers or attract new customers depending on their view of the UHG Transaction. For example, historically, ***we believe that certain*** customers have chosen us as their service provider in part due to our independent status. If customers no longer view us as an independent service provider, they may choose a different provider.¹⁶

Indeed, to the extent Change Healthcare is or may in the future provide oversight functions in a market in which UHG or Optum performs services such as pharmacy benefits management or managed care, its acquisition by UHG may compromise not only Change Healthcare's independence but also the very value it brings to many of its customers and to the market itself.

While Change Health's independence is enough to make it a disruptor in this highly consolidated market, Change Healthcare's track record and commitment to innovation solidifies its status as a disruptor. Examples of development of Change Healthcare products and services include Vaccinate Record (offering digital access to vaccine records from pharmacies), InterQual AutoReview, Connected Consumer Health Suite, and Telehealth Medical Eligibility and Claims Management.¹⁷

Considering Change Healthcare's independence and commitment to innovation, the proposed acquisition involves the likely loss of competition vis a vie the loss of a "independent," competitor who is not owned by a payer or provider organization as well as an established innovator in its industry.

¹⁵ Change Healthcare, Inc., Annual Report and Form 10k 2020, p. 21, available online at <https://www.annualreports.com/Company/change-healthcare-inc> (note this quote does not appear in the 10k filed with the SEC but does in the "2020 Annual Report and Form 10k).

¹⁶ Change Healthcare, Inc., Form 10k 2020, p. 28, available online at <https://ir.changehealthcare.com/node/8066/html>.

¹⁷ Id. at p. 7.

The proposed acquisition of Change Healthcare raises anti-competitive concerns in light of UHG's vertical integration.

As noted above, from a horizontal integration perspective, the acquisition of Change Healthcare is troubling and worthy of scrutiny for anticompetitive effects. However, APCI urges the DOJ not to assess this acquisition based on its horizontal integration alone. APCI believes the potential anticompetitive implications to the acquisition are potentially more far reaching because of UHG's vertical integration.

The scope of UHG's vertical integration is vast. It provides, directly or through affiliates, health benefit plans, managed care services, healthcare technology services, health and wellness care services, and pharmacy benefit management services.¹⁸ As more fully elaborated below, because of UHG's vertical integration, the acquisition of Change Healthcare raises significant anti-competitive concerns.

The proposed acquisition would have the effect of removing an independent healthcare technology company from the market and likely lead to inefficiencies across impacted market channels.

In 2019, UHG and Optum processed nearly a trillion dollars in gross billed charges and managed more than \$250 billion in aggregate healthcare spending on behalf of customers and consumers.¹⁹ In pharmacy alone, Optum managed \$105 billion in pharmacy spending including \$40 billion in specialty spending.²⁰

With the sheer number of claims UHG and its subsidiaries and affiliates touch, whether submitting claims, reviewing claims, processing claims, or reimbursing claims, along with instances where UHG directly or through a subsidiary or affiliate may be both submitting claims and paying those very claims, the acquisition of Change Healthcare would eliminate the potential for it to provide independent services in connection with UHG business such as services and solutions dealing with billing, payment accuracy, revenue integrity, etc.

As Change Healthcare emphasized, part of its value to customers, includes "***the alignment it has with its customers due to not being owned by a payer or provider organization*** (emphasis added)."²¹ Should the acquisition of Change Healthcare be consummated any alignment on the basis of independence likely away for clients and prospective clients not affiliated with UHG any work performed by Change Healthcare on the nearly trillion dollars in UHG's gross billed charges potentially becomes self-interested.

The implications may be particularly acute in cases where Change Healthcare has or may in the future provide oversight responsibilities in markets in which UHG operates such as a commercial or governmental managed care plan.

¹⁸ UHG, Form 10k 2020, p. 1-5, available online at <https://www.unitedhealthgroup.com/viewer.html?file=/content/dam/UHG/PDF/investors/2020/UNH-Form-10-K.pdf>.

¹⁹ Id. p. 1.

²⁰ Id., p. 9.

²¹ Change Healthcare, Inc., Annual Report and Form 10k 2020, p. 21, available online at <https://www.annualreports.com/Company/change-healthcare-inc> (note this quote does not appear in the 10k filed with the SEC but does in the "2020 Annual Report and Form 10k).

In pharmacy alone, Optum practices such as spread pricing in Ohio have called into question its value in reducing the costs of prescription drugs.²² While the foregoing example does not involve Change Healthcare, it is illustrative of the need for independent healthcare technology to work to increase efficiencies and reduce overall healthcare spend.

Because of UHG's vast vertical interests in the healthcare market, APCI is concerned its acquisition of Change Healthcare would likely have the effect of removing an independent healthcare technology firm from the market with the capability to provide independent products and services in connection with claims involving UHG and lead to inefficiencies in healthcare market channels.

The proposed acquisition of Change Healthcare would provide UHG with a host of sensitive data of competitor payers and providers and could potentially be exploited for anti-competitive purposes.

With Change Healthcare's Intelligent Healthcare Network having facilitated over 15 billion transactions and approximately \$1.5 trillion in adjudicated claims in the 2020 fiscal year, combined with its client makeup which includes physicians, hospitals, pharmacies, and payers, the proposed acquisition would give UHG access to unprecedented data points, healthcare information, and reimbursement information of competitors across the healthcare payer and provider chain. It is hard to understate the scope of potential implications with regard to UHG's access to the foregoing information of its competitors and how access to this information may be used.

What we do know is that UHG's interests in the healthcare marketplace are vast and its various subsidiaries and affiliates do not operate in a bubble or a silo but, rather, provide services up and down market channels to affiliates. By way of example,

- Certain product offerings and care management and local care delivery services are sold to UHG by OptumHealth;
- Health information and technology solutions, consulting and other services are sold to UHG by OptumInsight;
- OptumRx provides pharmacy care services to UHG customers;
- OptumHealth had \$22.4 billion in sales to affiliated customers in 2020;
- OptumInsight had \$6.9 billion in sales to affiliated customers in 2020; and
- OptumRx had \$52.4 billion in sales to affiliated customers.²³

In the pharmacy industry, large PBMs often engage in self-interested practices across market channels such as steering. By way of example, cancer patients are often denied the ability to obtain cancer medications from their oncologist and forced to obtain the medications through PBM affiliated mail order specialty pharmacies. Similarly, patients on medications to treat chronic diseases such as heart disease, high blood pressure, and diabetes are often denied

²² Lucas Sullivan and Catherine Candisky, "Ohio firing pharmacy middlemen that cost taxpayers millions", The Columbus Dispatch, 14 Aug. 2018, available online at <https://stories.usatodaynetwork.com/sideeffects/ohio-firing-pharmacy-middlemen-cost-taxpayers-millions/>.

²³ UHG, Form 10k 2020, p. 82-83, available online at <https://www.unitedhealthgroup.com/viewer.html?file=/content/dam/UHG/PDF/investors/2020/UNH-Form-10-K.pdf>.

the ability to fill these prescriptions at their community pharmacy of choice and forced to obtain their medications from PBM affiliated mail order pharmacies. These practices can disrupt a patient's continuum of care, delay care, and result in reduced quality of care and poorer healthcare outcomes.

PBMs are able to engage in these practices as they are often the ones designing and implementing plans and the ones administering the prescription drug benefits. This is just one example of how a large insurer or PBM may utilize its vertically integrated position to make decisions that fragment and delay care but improve PBM bottom lines.

Self-interested PBM practices in connection with rebates also can have anti-competitive effects including unavailability of important medications as noted by FTC Commissioner Chopra:

Drug manufacturers pay large “rebates” to PBMs to ensure they get prominent placement on the formulary. Manufacturers may offer larger rebates – sometimes up to 50 percent of a drug's list price – conditioned on giving their product preferred status over a competing one, or for achieving a market share requirement. This creates a “wall” around their lucrative products in ways that can squelch out competitors. Third party payers will not turn to rival drugs in this situation, because they cannot afford to pay the full list price when the drug manufacturer stops paying the rebate.²⁴

Also, because of the opaque system designed by PBMs, there are times when rebates, discounts, and price concessions are not passed along to payors and patients. Finally, these rebate practices can have the effect of driving up prices of drugs, including drugs that have been on the market for long periods of time.²⁵

Access to competitor data held by Change Healthcare could be utilized by UHG to engage in self-dealing practices such as patient steering to UHG/Optum affiliated pharmacies. Potential self-interested transactions arising from the acquisition of Change Healthcare are not limited to the pharmacy realm. Reimbursement data could potentially be used by UHG in connection with potential acquisitions of providers and to attain information on competitor reimbursements.

In light of the foregoing, APCI respectfully requests that the DOJ scrutinize any self-dealing practices by UHG, its subsidiaries, and its affiliates including patient steering and data mining. In addition, scrutiny of UHG competitor payer and provider data in Change Health's possession and moving through its channels should also be scrutinized to assess potential ramifications of UHG's possession of such information.

²⁴ Statement of Commissioner Rohit Chopra Regarding the Commission's Report on Pharmacy Benefit Manager Rebate Walls, May 28, 2021, available online at https://www.ftc.gov/system/files/documents/public_statements/1590528/statement_of_commissioner_rohit_chopra_regarding_the_commissions_report_on_pharmacy_benefit_manager.pdf.

²⁵ U.S. Senate Finance Committee, Insulin: Examining the Factors Driving Rising Costs of a Century Old Drug, Staff Report, available online at [https://www.finance.senate.gov/imo/media/doc/Grassley-Wyden%20Insulin%20Report%20\(FINAL%201\).pdf](https://www.finance.senate.gov/imo/media/doc/Grassley-Wyden%20Insulin%20Report%20(FINAL%201).pdf).

Recent mergers in the healthcare space have resulted in anti-competitive effects and have not led to increased efficiencies

As noted by FTC Commissioner Choprain, there “is no instance where the FTC has filed a lawsuit in federal court to block a merger of pharmaceutical companies [and] the FTC has largely stood by as the [PBM] industry consolidated into three main giants . . .”²⁶

This consolidation has not resulted in increased efficiencies, but rather, “drug prices are out of control,” and there is a need for “[T]he FTC and Congress [to] take concrete steps to address the conflicts of interest embedded in the structure of the PBM industry.”²⁷

UHG is one of the highest ranked companies on the Fortune 500 list, one of the largest employers of physicians across the country while Optum is a major player in the industries of care delivery, data analytics, and pharmacy benefits management.²⁸ If it cannot achieve efficiencies at this size and scale, then it is hard to fathom the acquisition of Change Healthcare increasing efficiencies either. Rather, its acquisition serves to eliminate an OptumInsights competitor and as with several other vertical mergers in the healthcare space, likely to increase self-dealing in various market channels.

Conclusion

Community Pharmacy has vast experience in operating in an anti-competitive climate as a result of massive consolidation of insurers and PBMs as well as vertical integration of these entities with their affiliated specialty and mail order pharmacies. These vertically integrated companies have often leveraged their integration to maximize their profits at the expense of competition and patient choice.

APCI has deep concerns that UHG’s acquisition of Change Healthcare will harm competition directly from a vertical integration perspective and will be leveraged by UHG to give its vertically integrated subsidiaries and affiliates a competitive advantage at the expense of provider and payer competitors as well as patients. APCI is also concerned the acquisition may potentially compromise the independence and integrity of services performed by Change Healthcare on behalf of commercial and governmental clients including those for whom UHG provides services.

²⁶ Statement of Commissioner Rohit Chopra Regarding the Commission’s Report on Pharmacy Benefit Manager Rebate Walls, May 28, 2021, available online at https://www.ftc.gov/system/files/documents/public_statements/1590528/statement_of_commissioner_rohit_chopra_regarding_the_commissions_report_on_pharmacy_benefit_manager.pdf.

²⁷ Id.

²⁸ See 2021 Fortune 500 list available online at <https://fortune.com/fortune500/>; see also John Tozzi, “United Health Chases 10,000 More Doctors for Biggest U.S. Network,” Bloomberg, 5 Mar. 2021, available online at <https://www.bloomberg.com/news/articles/2021-03-05/unitedhealth-s-deal-machine-scoops-up-covid-hit-doctor-groups>.

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In light of these concerns, APCI stands in opposition to UHG's proposed acquisition of Change Healthcare. Additionally, prior to any approval by the DOJ, APCI respectfully requests further scrutiny of current UHG and Optum practices including UHG and Optum's use and treatment of data, markets where there is overlap between UHG and Change Healthcare, and any actions which may have been taken by UHG or Optum to steer business into vertically integrated channels.

Should you have any questions, or if you would like to discuss the above issues in more detail, please do not hesitate to contact us. Thank you for the opportunity to comment and for your diligent work thus far on this important matter.

Sincerely,

S/ Greg Reybold

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CC: FTC Chair Lina Khan, Esq.