March 19, 2025

Open Letter Requesting DOGE to Address Medicare Waste

Dear Mr. Musk,

Through a recent Freedom of Information Act request (FOIA) and a career litigating against Pharmacy Benefit Managers (PBMs) I can assure you that DOGE will find substantial waste. Medicare is entirely privatized by the Center for Medicare & Medicaid Services (CMS). CMS allows the major Medicare Plans to give "no bid" contracts to their sister companies-PBMs. CMS does not audit, and waste has blossomed. Providers, such as oncologists that dispense drugs and specialty pharmacies, are not to blame.

As the Co-founding Partner of Frier Levitt LLC, a boutique healthcare law firm, I've dedicated my career to representing stakeholders throughout the drug supply chain. I testified before the U.S. Senate Committee on Finance during its hearing titled "Pharmacy Benefit Managers and the Prescription Drug Supply Chain: Impact on Patients and Taxpayers," discussing the pervasive effects of vertically integrated pharmacy benefit managers ("PBMs") on the drug supply chain and patient care. ***The unchecked self-dealing by PBMs results in exponential increases of the overall drug spend at the expense of the American people***. I urge the Department of Government Efficiency ("DOGE") to review the wasteful expenditures in Medicare Part D and Medicare Advantage plans.

I. PBMs Perform the Vast Majority of Drug Benefit Management for Medicare Part D Plan Sponsors with No Oversight by CMS Based on the Result of Recent Freedom of Information Act ("FOIA") Requests

In the context of Medicare Part D, the voluntary pharmacy benefit for Medicare enrollees, CMS is arguably the plan sponsor. CMS contracts with and provides subsidies to private Part D Plan Sponsors, who offer prescription drug plans known as Prescription Drug Plans ("PDPs"). **CMS outsources** the Medicare Part D program to private PDP sponsors. Privately owned PDPs retain their sister company PBMs to manage the drug benefit. PBMs provide bundled services related to the administration of pharmacy benefits, including formulary design, formulary management, negotiation of branded drug rebates, and controlling network access of participating pharmacies. A recent report by the U.S. Government Accountability Office noted that, in the context of Medicare Part D, PBMs performed 74 percent of drug benefit management services on behalf of PDP sponsors.[1]

While PDP sponsors retain ultimate responsibility for compliance with Medicare Part D program requirements, PBMs are subject to audits and review by HHS, the Comptroller General, or their designees. CMS can compel enforcement with Medicare Part D program requirements via

[1] See GAO-19-498 MEDICARE PART D Use of Pharmacy Benefit Managers and Efforts to Manage Drug Expenditures and Utilization (July 2019), available at https://www.gao.gov/assets/gao-19-498.pdf (analyzing data from 2016).

various enforcement actions, such as corrective action plans, civil monetary penalties ("CMPs"), intermediate sanctions, non-renewals, and terminations.[2] However, under current practices, CMS limits audits to a narrow scope of issues, unrelated to the fiscal waste by PBMs and their vertically integrated affiliates.[3] Even worse, as demonstrated by recent FOIA requests to CMS, the agency has ***no records of audits or enforcement actions against PBMs for compliance with Medicare Part D Program requirements.***[4] **There is little to no oversight of Medicare Part D.**

II. *Without Immediate Intervention by DOGE, PBMs and PDPs Will Continue Self-Dealing At the Expense of the American People*

Left unchecked, PBMs will continue to engage in a variety of hidden tactics to generate wealth for their stockholders. PDPs are vertically integrated with PBMs, Rebate Aggregators, the largest specialty pharmacies and third party administrators. As discussed in the House Committee on Oversight and Accountability Report The Role of Pharmacy Benefit Managers in Prescription Drug Markets (the "House Committee Report"), PBMs are, among other anticompetitive conduct, "steering patients to PBM-owned pharmacies" and "forc[ing] drug manufacturers to pay high rebates for the manufacturer's drug to be placed in a favorable formulary tier while excluding competing, lower-priced prescriptions such as generics or biosimilars." CVS Health's PDP sponsor, Aetna, gave a "no bid" formulary contract to its affiliate, Caremark, just as Cigna and United Health similarly allow their vertically integrated PBMs, ESI and Optum respectively, to determine drug formularies without competitive bidding by manufacturers. ***The result? There is no incentive to drive down prescription drug costs.***

Indeed, the motivation of PBMs is clear from their conduct during the past twenty years. As noted in the House Committee Report, despite the ability of PBMs to decrease the costs of drugs, "the cost of prescription drugs has increased every year since 2005, patients have fewer choices for which pharmacies they want to use, and physicians are forced to prescribe specific PBM preferred medications which are often more expensive."[5]

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[2] See 42 C.F.R. §§ 42 C.F.R. 423.505(n)(3)(iii), 423.507; 423.509; 423.750; 423.752; 423.756.

[3] See, e.g., 2023 Part C and Part D Program Audit and Enforcement Report, CMS (July 23, 2024), available at https://www.cms.gov/files/document/2023-program-audit-enforcement-report.pdf; 2023 Part C and Part D Program Audit and Enforcement Report, CMS (July 18, 2023), available at https://www.cms.gov/files/document/2022-program-audit-enforcement-report.pdf-0.

[4] We have requested notices from HHS, the Comptroller General to PBMs and Medicare Part D plan sponsors where the agencies sought to "audit, evaluate, collect, and inspect any books, contracts, computer or other electronic systems [. . .] related to CMS's contract with the Part D sponsor" (collectively, the "Audit Notices"), as provided under 42 C.F.R. § 423.505(i)(2)(i), and audit responses relating to unreasonably low pharmacy reimbursement rates in violation of the federal any willing provider law. We also requested CMS's (i) notices of noncompliance, warning letters, and corrective action plans (collectively "Compliance Actions"), as described under 42 C.F.R. § 423.505(n)(3), issued to Medicare Part D plan sponsors or any first tier, downstream, and related entities for failure to comply with or adhere to the requirements set forth in 42 C.F.R. § 423.505(i); and (ii) civil monetary penalties ("CMP"), intermediate sanctions, non-renewals and terminations (collectively "Enforcement Actions") issued to Medicare Part D plan sponsors or any first tier, downstream, and related entities for failure to comply with or adhere to the requirements set forth in 42 C.F.R. § 423.505(i). CMS responded that, after performing reasonable searches, there were no records responsive to these requests.

[5] See House Committee Report at 51.

III. Formulary Overhauls to Mandate Inclusion of Transparently Priced Drugs Will Result in Billions of Dollars of Savings to the Medicare Program.

PBMs' requirement that high-cost drugs are covered over cost efficient non-formulary alternatives is costing billions of dollars of unnecessary drug expenditures. The Federal Trade Commission ("FTC") determined that health plans reimbursed affiliated pharmacies for generic Zytiga, used to treat prostate cancer, at more than $5,800 per month in 2022,[6] while **the same generic was available from Mark Cuban Cost Plus Drugs for $34.50 per month**. But PBMs like Caremark have not admitted companies like Mark Cuban Cost Plus Drugs into their networks, forcing patients, plans and taxpayers alike to fund overpriced generic medications dispensed at the PBMs' sister pharmacies.

Unfortunately, this issue has grown worse in recent years with PBMs creating their own drug manufacturing companies. In the case of biosimilars for AbbVie's Humira, CVS Health's affiliated company, Cordavis, offers a biosimilar, Hyrimoz, priced at approximately $1,300.00, while Mark Cuban Cost Plus Drugs offers Coherus's biosimilar, Yusimry, at the transparent price of $584.25. However, not only has overall adoption of biosimilars been artificially suppressed because of **PBMs' unending desire for rebates**, but what little biosimilar adoption there has been almost exclusively reaped by CVS Health. In a May 2024 report, IQVIA found that Cordavis's Hyrimoz was responsible for 82% of the Humira biosimilar prescriptions, or 4.5 times as much as all other biosimilars combined.[7] This is driven by the fact that Caremark mandates that patients take ***its*** version of the Humira biosimilar, not cheaper alternatives.

We are calling on DOGE to audit rebates of the big three PBMs and their related PDPs.

DOGE must review this issue and provide recommendations to eradicate waste by the PBMs, estimated at least Fifty Billion Dollars, to the Medicare Program. Change must be implemented to address the ongoing waste of the Medicare Program funds, especially in consideration of the ***CMS's systematic inaction***.

Thank you for your time and consideration on this critical issue.

Very truly yours,

FRIER & LEVITT, LLC

[6] See Pharmacy Benefit Managers: The Powerful Middlemen Inflating Drug Costs and Squeezing Main Street Pharmacies, U.S. Federal Trade Commission (July 2024) available at https://www.ftc.gov/system/files/ftc_gov/pdf/pharmacy-benefit-managers-staff-report.pdf.

[7] See Zoey Becker, AbbVie's Humira loses some ground in high-stakes battle against biosimilars: report, Fierce Pharma (July 12, 2024), available at https://www.fiercepharma.com/pharma/shrinking-market-share-abbvies-humira-loses-ground-battle-against-biosimilars-report.

/S/Jonathan Levitt

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