

Written Testimony of

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Before the

U.S. House of Representatives

House Judiciary Committee

**Subcommittee on Intellectual Property, Competition and the
Internet**

**Concerning H.R. 1946, the “Preserving Our Hometown
Independent Pharmacies Act of 2011”**

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Chairman Goodlatte, Ranking Member Watt, and members of the subcommittee, good morning and thank you for inviting me to testify on the need for passage of HR 1946, a bill to let independent pharmacies negotiate together against large, multi-state pharmacy benefit management (PBM) corporations.

My name is Mike James. I am Vice President and Director of Government Affairs for the Association of Community Pharmacies Congressional Network. I am also a practicing pharmacist and the owner of an independent, community pharmacy in Raleigh, North Carolina.

I have one purpose here today: To help 22,000 independent pharmacies across the country get your attention before they are wiped out. Here is what you need to know:

1. There are on average 50 independent pharmacies in every congressional district—that's 50 small businesses in your districts that are owned, managed, and staffed by (according to annual surveys for the past decade) the most trusted professionals in your communities.
2. Every one of these small business owners is facing anti-competitive abuses by PBM corporations that are forcing them out of business, and every one of them that fails to beat these abuses will be forced to lay off employees, close up shops, and turn patients away. Imagine the impact in your congressional district of just one more pharmacy closure this month: It will mean several lost high-paying jobs, thousands upon thousands of dollars in revenues and taxes lost to the community, and redirection of patient care out of your towns and into mail-order programs that are managed by automated systems in another state.
3. The abuses your home town pharmacies are facing are a result of the erosion of a competitive market that has been enabled by Congress and ignored by the Federal Trade Commission.

Let me explain exactly what I mean.

The Prescription Drug Market is Now Owned by PBMs

First, let me point out that I testified before the Judiciary Committee on similar legislation that passed the committee in 2007. Since then, the problems the bill was drafted to address have grown worse because PBMs have consolidated their market power.

Specifically, Express Scripts acquired Wellpoint, CVS acquired Caremark, and now Express Scripts is about to acquire Medco. This last deal alone will empower a single PBM to dictate to 150 million consumers what medications they can take, how much they will pay for each prescription, and where they can get their prescriptions filled. In fact, that single PBM will control 40% of the entire prescription drug market in the U.S. The three largest PBMs will control more than 85% of every prescription in America.

Here is what that means: Virtually every single prescription a pharmacist in your district handles is controlled by one of three PBMs. The PBMs tell your pharmacists whether they can fill a prescription at their pharmacies, whether they can use a lower-cost generic or must use a more profitable brand preferred by the PBM, and what profit margin the pharmacy is allowed to keep. Keep in mind that these PBMs are in direct competition with every pharmacy in every one of your districts.

Want Proof? Ask Your Pharmacy Constituents

Let's look closely at the ridiculous system that has been created--I encourage every member of Congress to reach out to at least one independent pharmacy at home. Here is what you will find:

- Every pharmacy will have a contract with one or more PBM. The contract will prohibit any disclosure by the pharmacy--including to patients--of how much the pharmacy paid for the prescriptions they fill, how much the PBM pays the pharmacy for the prescriptions, and how much profit the PBM keeps.
- The contracts will tell every pharmacy they may *not* under any circumstances fill

prescriptions for any patient beyond 30 days.

- The contracts will require every pharmacy to turn over all of its data about every patient in a plan, including his or her mailing information.

Here is what else you will find:

- Every pharmacy in your district will be able to provide you with specific examples of how the PBMs reimburse them for prescriptions at less than their actual cost to acquire the drugs.
- Every pharmacy will tell you that the PBMs routinely offer more convenient 60- and 90-day prescriptions to any patient who will agree to leave the pharmacy and register for the PBM's proprietary mail service.
- Every pharmacy will tell you that the PBMs use the patient data they are required to provide to steal their customers by either forcing the patient to drop their local pharmacy or coercing them with discounts the pharmacy is barred by contract from offering.

Now, let's look at real-world data--facts--to see exactly how this works. I have in my hand a copy of a report from Park West Pharmacy in Little Rock, Arkansas, which is located in Representative Griffin's district. They sent me a copy of their letter to you this week, Congressman, in which they requested that this information be entered into the hearing record. It provides a detailed list of every prescription the pharmacy filled from January of this year to Monday of this week in which they lost money because PBMs under-reimbursed them. Here is exactly what the report shows:

- Park West Pharmacy so far this year has lost money on 218 prescriptions because PBMs simply refused to pay them back in full for the actual cost of the drugs.
- Park West Pharmacy spent \$20,716 for the drugs, but received only \$15,489 from the

PBMs. When patient co-payments were added, the pharmacy recovered just \$18,886.

That means Park West Pharmacy lost \$1,830, or 9% of their total expenditures. It also means that the PBMs made a profit on these drugs by literally using Park West Pharmacy as a form of lending agent—and then stiffing the lender. Every other independent pharmacy in America faces the same situation on dozens and even hundreds of transactions every day. Here is something else you should know: Park West Pharmacy and every other independent pharmacy in the country are prohibited by contract from telling anyone how much they pay for prescriptions, or how much the PBMs pay them back. Why does this matter? Because it prevents plan providers—and Congress and the FTC—from knowing how much those same PBMs charged their customers for the drugs. I don't care what you hear from the PBM industry today—you will not hear them give you this information.

Who Is Looking Out for Pharmacies in Your Districts?

You think this is fair? Do members of Congress think this is anything other than a systematic, anti-competitive manipulation of the market? And what about the FTC? Do our federal regulators--who are supposed to consider the impact of competition and abusive monopolistic behavior on main street Americans--think their so-called "analysis" of this issue engenders anything but mistrust and disgust from 22,000 pharmacy owners and the millions of patients they serve?

Since we have the FTC with us today, let's get real. The pharmacies in your districts know that the goal of PBM contracts is to systematically undermine the solvency of the independent pharmacies that compete with them, and to force patients covered under PBM agreements into their highly profitable proprietary mail-order programs. I challenge the FTC to convince the committee members--and the thousands of small business owners in their districts who are being driven under while you tell us about your outdated studies--otherwise.

The FTC Relies on Theory, Not Data

The FTC will tell us that empowering pharmacies to negotiate together will increase drug prices. Based on what facts? Look closely at the FTC testimony. Do they anywhere reference actual pharmacy pricing data? No. The agency cites 2007 opinions by the Antitrust Modernization Commission, refers to its 2009 study of competition for biologic drugs, two general studies from 2004 and 2005, and staff comments presented to a few state legislatures. The agency has opinions, but not facts.

Why should Congress bother with these opinions when the agency cannot even comment on how PBMs are manipulating prices right now to destroy competition? How does the FTC explain why PBMs handled 10% of prescriptions just a few years ago, and now handle 85% of prescriptions? A significant part of this market expansion is attributed to passage by Congress of provisions in the new Medicare Part D law that handed whole markets over to the PBMs. What attributes for the rest of their aggressive growth?

Is it superior pricing? Certainly not. A survey conducted by Consumer Reports in 2011 of popular brand-name drug prices found independent pharmacies offered lower prices than traditional, national pharmacies, including those owned by the PBMs. And when it comes to lower-cost generic drugs, independent pharmacies use generics to fill over 70% of prescriptions compared to less than 60% by PBMs (since they make more in rebates and secret “spread pricing” from brands). What if we factor in PBM claims that their mail-order programs can’t be beat? Consider this statement from American Health & Drug Benefits, a peer-reviewed forum for pharmacy benefit program designs:

More controversial, however, is the validity of claims by PBMs that mail-order programs offer significant cost savings to plan sponsors. Very limited research has been conducted to definitively establish a significant economic value of mail order pharmacy service. The limited study data published show mixed results, raising questions about the cost impact to the plan sponsor.

The FTC offers opinions without data. The pharmacies in your districts can provide you with

data, and it will change your views about the real threat to lower drug prices.

Key Questions We Hope You Will Ask

Here are questions the FTC and PBM representatives who are with us today should be asked to answer:

1. What other industries are allowed to use confidential patient data that is compelled by contract or federal law to steer consumers into proprietary programs?
2. Why should PBM corporations be allowed to maintain confidentiality provisions in their contracts--even on a supposedly "volunteer" basis--to prevent public disclosure of costs that are borne by state and federal governments?
3. Under what reasonable standard should pharmacies be locked out of the markets for services customers want, like 90-day prescriptions when appropriate?

Misinformation We Know PBMs Will Give You

Finally, on behalf of the pharmacy owners in your districts who want to compete head-to-head with PBMs, we hope you will make the PBM industry's representative do more at this hearing than simply throw around aggregate data that cannot be validated, claim that lack of transparency in prescription drug transactions is somehow "good" for keeping prices low, and ask you to look the other way when they steer as many people as possible out of your local pharmacies and into their extremely profitable proprietary programs. Instead, how about asking him to explain why they are systematically under-paying Park West Pharmacy in Representative Griffin's district? Perhaps the PBM representative here today can go through this list of transactions with us to explain what policy guides this behavior. At minimum, let's ask him to tell us how much of the money they took from Park West Pharmacy went to the PBMs' insurance customers, and how much the PBMs simply put in their pockets without telling anyone.

Then let's ask this question: If the FTC and PBM representatives here today see nothing wrong with allowing the largest PBMs to consolidate into national conglomerates that put a stranglehold on their retail competitors, how can they argue that efforts by independent pharmacies to fight back together will have a worse affect on the market?

Finally, as long as the FTC fails to grasp the micro-effects of the PBM industry's clearly anti-competitive practices--micro-effects I might add that sum up to an obvious macro-strategy of restraining trade and manipulating competition--there is only one way Congress can address this problem. That is to empower pharmacies to fight back on their own.

Now let's all sit back and listen to the PBM representative, who will argue that HR 1946 provides a "license to engage in price fixing and boycotts" that will lead to higher drug prices. The FTC may think my small pharmacy in North Carolina has the power to undermine the multi-billion dollar PBM corporations that fight me every day, and the PBMs may tell you that a few pharmacies negotiating against them in your districts can manipulate drug prices against your constituents. But the reason I am here today is to encourage you to go ask the independent pharmacies in your district: "Who is manipulating whom?"

Mr. Chairman, HR 1946 is the key to restoring pharmacy competition. I encourage the subcommittee to pass it right away.

Thank you.