



FTC chair Lina Khan with National Community Pharmacists Association CEO Douglas Hoey (NCPA via Twitter)

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Pharma

## FTC chair Lina Khan pledges to use all tools to investigate PBMs

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**KANSAS CITY, Mo.** — Pharmacy benefit managers have become a thorn in the side of the pharma and insurance industries in recent years, and just a couple of months after the Federal Trade Commission signaled it would investigate unlawful PBM practices, FTC chair Lina Khan is looking to turn up the heat even more.

Khan sat down with National Community Pharmacists Association CEO Douglas Hoey on Monday morning at the NCPA's annual convention, with a fireside chat in the heart of the Midwest.

Responding to a question about if the FTC is considering un-

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enforcement action or even a market-wide rule, if certain practices are widespread enough.

“We’re kind of looking at middlemen across the board to try to understand, how could we be making sure that these markets are really serving people and not just the narrow self interests of gatekeepers?” Khan said to applause from the audience.

The federal commission — made up of five commissioners — officially announced the launch of a 6(b) study into the industry’s middlemen in June, taking a look at the practices of some of these businesses and their effects on drug prices. The study was authorized by a vote of 5-0, after a previous effort at launching a study failed 2-2.

The FTC said at the time that it would require the six largest PBMs — CVS Caremark, Express Scripts, OptumRx, Humana, Prime Therapeutics and MedImpact Healthcare Systems — to produce information and records.

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In response to a question about whether there are laws that prohibit certain anti-competitive behavior allegedly done by PBMs, Khan answered in the affirmative, noting two laws that were passed decades ago that have not been utilized in recent memory by the commission. However, those laws were passed before a philosophy shift in terms of what defines antitrust.

According to Khan, the initial thought behind antitrust laws was to promote fair competition and decentralize power. But then it switched in the 1980s to focus “much more on a narrow conception of efficiency,” the chair noted — allowing for

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“And I think we’re now at a moment where we are realizing that that has had real consequences, and that there are all sorts of sectors of our economy that are no longer competitive. And that’s leading to higher prices, lower wages, lower rates of business formation and lower rates of innovation. And so we’re in a moment of reassessment,” Khan said, adding:

*There are areas where we still have legal tools that we should be able to activate, and that’s something that we’re doing at the FTC. So Congress gave the FTC something called Section Five — unfair methods of competition authority, which is an authority that the FTC has not really used for decades. And so, we have the work underway to reactivate that, start looking at how we can be using that tool. There’s also the Robinson-Patman Act, which was passed in the 1930s against the backdrop of the rise of the big chain stores. So you have A&P and all sorts of other big retail chains that were emerging that were in many ways, providing better services. But in other ways, they were really using their size to squeeze with smaller wholesalers and get discounts and other types of advantages that lawmakers identified as unfair. And so they passed the Robinson-Patman Act to say what size actually confers legitimate efficiencies or legitimate benefits, that’s okay. But what we want to prohibit is instances where size is able just to bully its way into getting certain advantages or benefits.*

The Robinson-Patman Act of 1936 became a mainstay of the FTC throughout the 1950s and 1960s, and also hasn’t been enforced in decades. Khan noted that the agency is taking a look at how it can be applied in modern day to commercial bribery, and looking at the ways at how the law can interact with some of the rebating practices of PBMs.

That announcement of the study had been months in the making, with bipartisan efforts to crack down on PBMs — Republican Sens. Chuck Grassley (IA) and Mike Braun (IN).

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named President Biden appointee Alvaro Bedoya as the deciding vote on a previously-split 2-2 Federal Trade Commission.

Pivoting briefly to M&A, Khan noted that the FTC is looking at revising merger guidelines — and as pharma companies have been eager to break new ground on M&A in this economy, they might have to rethink their game plan.

Says the commissioner:

*One of the projects that we have underway in tandem with the Justice Department is revising what's known as the merger guidelines. So this is kind of our core enforcement manual that is used to identify what types of mergers and what types of deals are legal — and what types are illegal. One of the key parts of that revisiting is taking a fresh look at how we approach vertical mergers in particular, because I think there have been all sorts of instances in which enforcers have allowed deals to go through and then realize that many of the benefits or efficiencies that were promised didn't actually end up manifesting. And instead, what you started seeing was certain types of barriers to entry that actually made the market less competitive and more soft for most market participants. So it's something we're looking at very, very closely because we know that it's a big issue in this sector.*

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