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The Honorable Andrew M. Cuomo, Governor
Executive Chamber
State Capitol
Albany, NY 12224

RE: Support NYS Bill AB 5502-B: Local Option- Eliminate Mandatory Mail Order

Dear Governor Cuomo:

I am writing to express my support for NYS Bill Assembly Bill 5502-B (“A-5502-B” or “the Bill”). This Bill would preserve patient choice thereby, protecting the important competition among pharmacies that leads to improved service at decreased costs. I encourage you, Governor Cuomo, to protect the competition among pharmacies that ultimately benefits New York consumers and sign this bill into law. In particular, I am writing to explain why concerns expressed by the staff of the Federal Trade Commission (“FTC”) do not provide a sound basis for rejecting the legislation.

My comments in this letter are based on my 20 plus years of experience as a private sector antitrust attorney and an antitrust enforcer for both the Department of Justice and the Federal Trade Commission. From 1995 to 2001, I served as the Policy Director for the FTC’s Bureau of Competition and the attorney advisor to Chairman Robert Pitofsky. Currently, I work as a public interest antitrust attorney in Washington, DC as well as a Senior Fellow at the Center for American Progress where I focus on health care and competition policy. From my extensive experience as an antitrust enforcer and in advising Congress and state legislatures, I know that federal agencies can play an important role in advising the legislative process. This advice is most valuable when it is based on sound empirical analysis and real world evidence.

The FTC’s comments on the proposed legislation, however, lack any substantial empirical basis and are quite off the mark:

- The FTC relies on a single dated study to suggest mail order is less expensive than retail pharmacies. Contrary to the 2005 study, countless other studies have found that mail-order is *not* actually less expensive than retail pharmacies for health plans and consumers.
- The FTC’s assertions about the anticompetitive effects of “Any Willing Provider” (“AWP”) laws are based on paltry empirical evidence and represent an unreasonable generalization.

- The FTC’s proposition that the Bill will reduce competition between pharmacies is short-sighted and off-base. By allowing consumers to choose their provider, this Bill quite oppositely encourages greater competition among pharmacies.

Mail Order- Not Less Expensive for Health Plans and Consumers

Whether mail order or retail pharmacy distribution is preferable was carefully considered by the state legislature in its consideration of this Bill. Setting aside the cost to the health plan, community pharmacies are preferable in several respects. Community pharmacies offer health care counseling for consumers and in inner city or rural areas, a community pharmacist may be the closest and most accessible health care provider. Mail order may be a risky proposition in many inner city neighborhoods. Numerous drugs, especially those that need special handling or counseling are delivered more effectively in a face-to-face interaction with a pharmacist. Forcing consumers into “mandatory” mail order clearly reduces consumer choice and deprives consumers of the services they often need.

The FTC letter ignores all of these important aspects of service competition that are critical to consumers. Rather it focuses solely on the cost to the health plan and suggests that mail order is less expensive. Relying on just one study conducted six years ago, the FTC makes the assertion in its letter that, “mail order pharmacies typically are less expensive than retail pharmacies for both health plans and their members.”¹

Since this time, however, the PBM market has considerably evolved and a number of studies carried out since suggest that in many cases, mail order actually costs health plans and consumers considerably more.² Evidence has exposed, for example, that generic drug substitution rates are 10 to 13 percentage points lower in the mail order businesses of the dominant PBMs than in the retail channel.³ Generics save health plans 2.5 percent for every one percent increase in generic utilization⁴—savings which will, of course, ultimately benefit consumers. The lower mail order generic dispensing rates are likely the result of the PBM’s incentive to profit from the rebates they receive on brand name drugs—which cost both plans

¹ FTC letter at page 2.

² Comparison of Mail-Order With Community Pharmacy in Plan Sponsor Cost and Member Cost in Two Large Pharmacy Benefit Plans; Michael Johnsrud, PhD, RPh; Kenneth A. Lawson, PhD, RPh; and Marvin D. Sheperd, PhD, RPh, *Journal of Managed Care Pharmacy*, 2007; 13(2):122-34

A comparison of mail-service and retail community pharmacy claims in 5 prescription benefit plans; Bartholomew E. Clark, PhD, Mark V. Siracuse, PharmD, PhD, Robert I Garis, MBA, PhD; *ScienceDirect, Research in Social and Administrative Pharmacy*, 5(2009) pp. 133-142

Comparison of costs of community mail service pharmacy; Carroll NV, Brusilovsky I, York B, Oscar R; *J AM Pharm Assoc* (2003). 2005 May-June; 45(3):336-43

³ Big 3 GDR by Channel, SEC filings and company reports; 2007-2010.

⁴ Prescription Drug Costs and the Generic Dispensing Ration; J N. Liberman, PhD, M. Christopher Roebuck, MBA, *Journal of Managed Care Pharmacy*, Sept. 2010, pp. 502-506, Vol. 16, No. 7.

and consumers five times more than the generic alternative. The perception that mail order is typically less expensive than retail pharmacy, therefore, is dated and inaccurate.

Limited Empirical Basis for AWP Laws as Anticompetitive

Rather than relying on any real world evidence of the effect of AWP legislation on pharmaceutical markets, the FTC's comments rely wholly on theoretical arguments and studies that only deal generally with health care contracting.

The FTC's letter is based simply on theoretical arguments and economic research that suggests, *as a general matter*, that selective contracting may be beneficial. That may have been an attractive notion in the early 1990s, when scholars and health care theoreticians proposed systems of exclusive networks of healthcare providers (e.g., the Clinton Administration health care plan). But the market quickly rejected these artificial constructs, because consumers wanted choice and demanded inclusive networks. In fact, the clear trend in the marketplace has been towards inclusive rather than exclusive networks.

Real world evidence demonstrates that fully inclusive networks – those that include retail pharmacy along with mail order – fully benefit consumers. Congress grappled with the issue of whether to adopt an AWP provision when it enacted Medicare Part D and it choose to do so. The Medicare Part D program offers a real world example of the benefits of broad pharmacy networks. Part D plans are required to let beneficiaries obtain 90-day prescriptions at retail pharmacies given that any additional costs are covered by the pharmacy and beneficiary. Accordingly, pharmacies accept lower prices and consumers utilize their preferred level of pharmacy service.⁵ Despite any theoretical arguments hypothesizing otherwise, this program structure, very similar to the provisions of A-5502-B, has proven in practice to be effective at ensuring adequate consumer choice, decreasing costs, and improving service.

It is not unusual for states to reject the advocacy of the FTC staff. Even though the FTC actively advocated against AWP laws in the 1980s and early 1990s, for example, over 30 state legislatures rejected the staff's theoretical model and adopted these laws, many for the provision of pharmaceutical benefits. Rhode Island, Massachusetts, South Carolina, New Jersey, and New Hampshire all represent states that, in the face of public FTC opposition, have passed such AWP laws.⁶

If selective contracting was so clearly beneficial, and overly broad networks were anticompetitive, one would expect the staff to be able to cite FTC enforcement actions against overly broad networks. Yet, the staff letter cites no enforcement action, because there are none. Rather, the FTC has permitted the creation of very large networks, because those networks are what the market demands. Consumers want choice and availability of numerous alternative

⁵ NCPA August 11, 2011 letter to Chairman Leibowitz re: Concerns with FTC letter Opposing NYS Bill AB 5502-B.

⁶ Moreover, Texas recently enacted health care reform legislation and Mississippi PBM regulation despite the FTC's advocacy in opposition.

pharmacies. The FTC's opposition to AWP laws is simply antiquated and ignores the clear trend of both legislatures and the marketplace to require broader access for consumers.

A-5502-B Encourages Greater Competition among Pharmacies

The FTC's letter claims that the Bill would likely have "the unintended consequence of harming consumers" by reducing competition between pharmacies.⁷ They are concerned that by limiting a health plan's ability to offer favorable treatment to mail-order, incentives to bid aggressively for business will be undermined. This narrow perspective of the market, however, fails to acknowledge the impact on the ultimate consumer—the patient.

This bill will be a significant spur to competition by putting mail order and community pharmacies on a level playing field. By protecting the ultimate consumer's ability to utilize their pharmacy of choice, this Bill would force mail order companies to compete with retail pharmacies on cost and quality of service. This competition for patients represents an important level of rivalry among pharmacy businesses that will result in improved service for the patients of both mail order and retail pharmacies. As the FTC letter appropriately states, "vigorous competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality products and services, more choices, and greater innovation."⁸ The FTC's short-sighted take on this market ignores that fact that, by preserving a patient's ability to choose their own provider, A-5502-B protects this very concept of competition.

A-5502 clearly enhances consumer welfare by protecting patient choice and increasing access to what the individual consumer deems as proper pharmacy care. The Bill increases convenience by enabling consumers to receive pharmacy service from a broader array of providers. Furthermore, by forcing mail order businesses to directly compete with the service provided by retail pharmacies, consumers will benefit from improved pharmacy services and decreased costs.

The FTC's position is inconsistent with current marketplace realities, lacks a sound empirical foundation and therefore, inappropriately dismisses the potential benefits of this Bill. A-5502-B will protect the consumer's ability to choose their pharmacy provider, and thereby allow competitive forces to better control cost and quality in the delivery of pharmaceuticals. This Bill will indeed broaden access to pharmaceutical services and increase the welfare of all consumers. I strongly support A-5502-B and urge that you sign it into law.

I appreciate the opportunity to provide these comments.

Sincerely,



David Balto

⁷ FTC letter at page 1.

⁸ FTC letter at page 2.