‘It’s beyond unethical’: Opaque conflicts of interest permeate prescription drug benefits

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By Bob Herman[1] [2]

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Eros Dervishi for STAT

Employers across the country — from big names like Boeing and UPS to local school systems — pay consulting firms to handle a straightforward task with their prescription drug coverage: Get the best deals possible, and make sure the industry's middlemen, known as pharmacy benefit managers, aren't ripping them off with unfair contracts.

But a largely hidden flow of money between major consulting conglomerates and PBMs compromises that relationship, a STAT investigation shows. Some consulting firms often are getting paid more — a lot more — by the PBMs and health insurance carriers that they are supposed to scrutinize than by companies they are supposed to be looking out for.

Consulting firms can collect at least $1 per prescription from the largest PBMs, according to more than a dozen independent drug benefits consultants and attorneys involved with employers' PBM contracts. That can go as high as $5 per prescription in extreme cases, three of those people said. Consulting firms and brokerages may receive a certain dollar amount for each covered employee and member. Or they may share in the rebates that the PBMs pluck from pharmaceutical manufacturers — money that otherwise could be used by employers to lower premiums for their workers.

As the United States spends more than $600 billion per year[3] on medicines, these little-known arrangements could add up to billions of dollars on their own, some experts estimate.

In exchange for the payments, the dominant PBMs get steady business from employers that rarely switch vendors, and they make it more likely that consulting firms and brokers won't tattle if PBMs bake in more ways to extract profits from employers, nearly all of STAT's sources said.

"The broker not only gives bad advice to the employer that's in the broker's self-interest, but the broker also allows the big PBM to write crazy terms into a contract," said Jon Levitt, an attorney at Frier Levitt who represents employers and analyzes PBM contracts.

"It's unethical,'' he said. "It's beyond unethical."

STAT's yearlong investigation is the first in-depth examination into these opaque financial relationships between consulting firms and PBMs. STAT spoke with more than two dozen benefits consultants, attorneys, pharmacy benefits executives, and employer representatives, and reviewed court filings and an internal document.

This comes as Congress is probing PBMs[6], whose main jobs are negotiating drug discounts and creating lists and tiers of covered drugs. Congress is considering legislation that would rein in some of their practices, although these behind-the-scenes payments remain mostly unknown.

The consequences of these fees are far-ranging. They can lead to excessive drug spending for employers, which often translates into less money in employees' pockets through stagnant salaries or diluted medical benefits.

Consulting firms that take the fees are arguably the most in the wrong, more than 10 people who work with drug benefits told STAT. Accepting money from PBMs, they said, undermines the consulting firms' ability to be impartial.

It’s unclear which consulting firms are engaging in this practice: Fees paid to them by PBMs are difficult to track because they don’t have to be reported to the federal government. But five people who have worked in PBM bids or reviewed contracts specifically named Aon and Willis Towers Watson as firms that take fees. Three named Mercer and Gallagher.

Many employers may have no idea of the full extent of the financial ties between PBMs and consulting firms. Some PBMs and consultants don’t disclose the payments in their contracts, according to three independent consultants and attorneys. In other cases, the language is so unclear it obfuscates the relationship, seven people said. Employers also may be neglecting their legal duty by not asking their consultants and brokers to disclose all the sources of their revenue.

“There’s so much money under the table,” said Frank Stichter, an independent consultant who specializes in drug benefits. For more than two decades, Stichter was a traditional broker, but went off on his own eight years ago. “I got tired of the shenanigans,” he said.

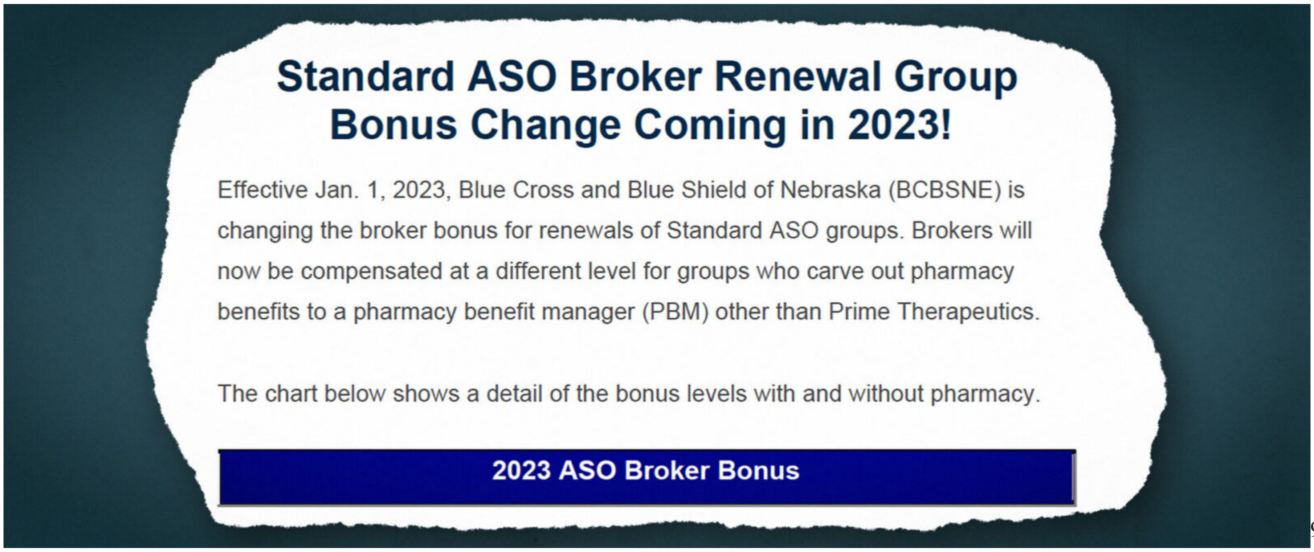
STAT asked four of the largest consulting firms working on prescription drug benefits about the practice of taking fees from PBMs. None said definitively that they don’t take any compensation from PBMs.

Two, Gallagher and Willis Towers Watson, declined to comment. Mercer said in a statement its “policies require us to disclose to clients all direct and indirect compensation we receive in connection with providing services.” Aon, another major firm, said it provides “full compensation transparency.”

Two of three largest PBMs, Cigna’s Express Scripts and UnitedHealth Group’s OptumRx, offered incomplete explanations for why they might pay consulting firms, and did not answer certain follow-up questions. They claimed employers sign off on any fees that are paid to consultants and brokers. The last major PBM, CVS Health’s Caremark, declined to answer any questions.

None of the consulting firms or PBMs agreed to interviews.

Some of the country’s largest employers, such as Apple, Ford, and Starbucks, are not talking about how they are holding their prescription drug coverage providers accountable. The few that responded to STAT said they follow the law.



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In August 2022, Blue Cross and Blue Shield of Nebraska sent an enticing offer to its universe of brokers. The insurance company excitedly announced a new "bonus change" that would start Jan. 1, 2023.

The document[10], obtained by STAT, details how BCBS of Nebraska would pay brokers 30%-35% more if they persuaded the insurance company's large self-insured clients to renew with Prime Therapeutics, the large pharmacy benefit manager that BCBS of Nebraska co-founded in 1998 and is now used and owned by 19 Blues plans across the country. The program says nothing about whether using Prime Therapeutics would be best for employers, or if these bonuses would be disclosed to employers.

BCBS of Nebraska and Prime Therapeutics did not make anyone available for an interview. "Our broker compensation structure reflects our belief that an integrated pharmacy and medical plan provides the best value for our clients," a BCBS of Nebraska spokesperson said. "We are transparent with our clients about broker compensation."

This broker payout arrangement is just one example of what critics told STAT is a troubling financial web between the biggest consultants and PBMs. The payments take many names: referral fees, credits, incentives, bonuses, marketing allowances, commission overrides. Some of the fees are tied to the number of prescriptions dispensed to an employer's workforce, while others are annual fees based on the number of covered lives, more than a dozen people said.

Those payments have the same effect of encouraging consultants to recommend certain drug benefits vendors with little regard for whether the options are cost-effective for employers and workers. Although the exact size of payments is unknown, five independent PBM executives, attorneys, and consultants said that money paid by PBMs to consultants vastly exceeds the amounts that employers pay to consultants.

"Isn't this a conflict? The answer is absolutely," said Roy Wilkinson, an independent drug benefits consultant who runs his own small PBM called Mutual Rx, and who doesn't offer consultants these fees. "I'm surprised how often employers or any type of plan sponsor, whether they're a union or a municipality, are shocked when that possibility is raised with them — because they had no idea."

Four of the country's largest consulting houses — Aon, Gallagher, Mercer, and Willis Towers Watson — operate divisions that focus solely on prescription drug benefits for employers. Their pitch to companies: We have pharmacy expertise[12], so you should hire us[13] to get you a contract with great drug prices[14]. They frequently market their own drug-pricing coalitions[15] that tout bigger savings and rebates as part of a larger pool of employers. They often work with the big three PBMs: CVS, Express Scripts, and OptumRx.

Prescription bottles at the Express Scripts mail-in pharmacy warehouse in Florence, N.J. *AP Photo/Julio Cortez*

When employers choose consultants to help them with their medical and drug benefits, consultants pledge to work on behalf of those employers. It's common to see language like this 2011 bid from Gallagher[16], which told a school district in Florida it "will represent your best interests in all ongoing interactions with carriers and vendors" and "will fully disclose all compensation received."

The school district sued Gallagher in 2021, alleging Gallagher was accepting secret commissions from insurance carriers when it steered the district toward Cigna for medical benefits. Gallagher denied the charges, and the two sides settled[17] earlier this year.

That lawsuit rippled throughout the benefits community. It resurfaced the possibility that consultants and brokers were not always steering employers in the right direction, and that employers' benefits teams were outmatched. Those who work in the industry say the problem has been just as flagrant, if not more so, with prescription drugs.

"The consultant says [to the PBM], 'Yes, I want, you know, X dollars per prescription as my fee. And oh, by the way, let's keep this between us. You don't have to share that information with the client.' That was, for many years, the standard operating practice in the PBM world," said Wilkinson, who also does not accept any kind of fees or commissions. He and others argued that disclosures today are better than they once were, although multiple other critics said that's a low bar and that fees remain opaque.

Smaller PBMs said these relationships disadvantage them because they believe consultants will be less likely to recommend them if they don't offer payments. Chris Blackley, CEO and co-founder of the small PBM Prescryptive, called the fees "offensive." He said if a consultant is running a request for bids and is requiring some kind of payment to the consultant from his PBM, he will either decline to participate or insist on complete transparency.

"To the extent that there's a sense of integrity in the process, we require in the contract that the broker or consultant disclose to the client that they are receiving compensation [from the PBM], and that they're requiring it," Blackley said. "The conflict exists."

For PBMs, the payments to intermediaries provide a considerable return because they can then use their "playbook" of contracting tactics, said Paul Holmes, an attorney at Williams Barber Morel who has reviewed dozens of PBM contracts for employers over the past several years. Consultants and brokers rarely mention those practices to their clients and don't demand PBMs to remove them from contracts.

For example, PBMs may use convoluted definitions[19] of drug rebates, which are the discounts they negotiate from drug manufacturers. Because rebates on some drugs are so large and lucrative — sometimes more than 30%-40% of a drug's list price — PBMs may share some of that money with big consulting firms, according to three independent benefits consultants and executives.

PBMs also may block employers from getting their own drug claims data[20], favor brand-name drugs over generic equivalents[21], delay coverage of new generics and biosimilars, mark up prices of generic drugs, and require employers to use the PBM's mail-order pharmacy, Holmes said. If employers want to audit their drug contracts, the PBM may have to approve the auditor. All of these different maneuvers and contracting terms boost the PBM's bottom line.

"The plan sponsor ends up with a contract that is fairly one-sided in favor of the PBM," Holmes said.

And yet, employers usually don't fire consultants or PBMs. Many in the industry say that's because employers follow the adage in corporate America that "you don't get fired if you hire IBM." In other words, there's a perception of safety in going with well-known brands, even if they aren't the cheapest option.

With prescription drug coverage, that often means human resources executives go with one of the big three PBMs, usually with the blessing of their outside advisers. Benefits executives don't want to lose their jobs if they go with a smaller vendor that doesn't provide big rebates or messes up drug coverage for workers. As a result, the biggest PBMs win significant business from employers with the allure of sending them large rebate checks, and consulting firms and brokerages maintain a revenue stream.

A benefits leader at a large company that uses Willis Towers Watson's drug coalition told STAT it "would be highly eyebrow-raising if they were getting money from the other side."

Some view that thinking as denial — that employers don't want to believe their consultants would violate the long-term bonds they have built.

"There's a trust relationship factor," said Stichter, the drug benefits consultant. "'Gee, we've been with our broker for 10 years. They would never do anything like that.' It's like, you have no idea."

The consulting and brokerage giants say they are in compliance with all applicable laws. But at least some of them are also aware that some of their revenue poses ethical, and perhaps legal, complications.

Buried within annual financial reports to federal regulators, Aon and Willis Towers Watson have disclosed what they call "market-derived income" — which the consulting firms define in the reports as money they get from insurance companies. Aon and Willis Towers Watson consider the payments to be lawful, but admit this type of income is risky and opens them up to scrutiny under "conflict of interest, antitrust, unfair competition, conduct, and anti-bribery laws and regulations."

"Intermediaries in many markets have a duty to act in the best interests of their clients and payments from [insurance] carriers can incentivize intermediaries to put carriers' or their own interests ahead of their clients," Willis Towers Watson said in its most recent annual report[24].

None of the four major consulting firms said in unambiguous language that they don't take any payments from PBMs. Aon, for example, said in a statement that it doesn't "accept any compensation from PBMs to refer business," but didn't answer follow-up questions about whether it takes compensation from PBMs for other reasons. The spokesperson also contended the disclosure about market-derived income "has no connection to the way the pharmacy practice operates," but did not explain why it doesn't apply, or to what areas of its business that disclosure applies.

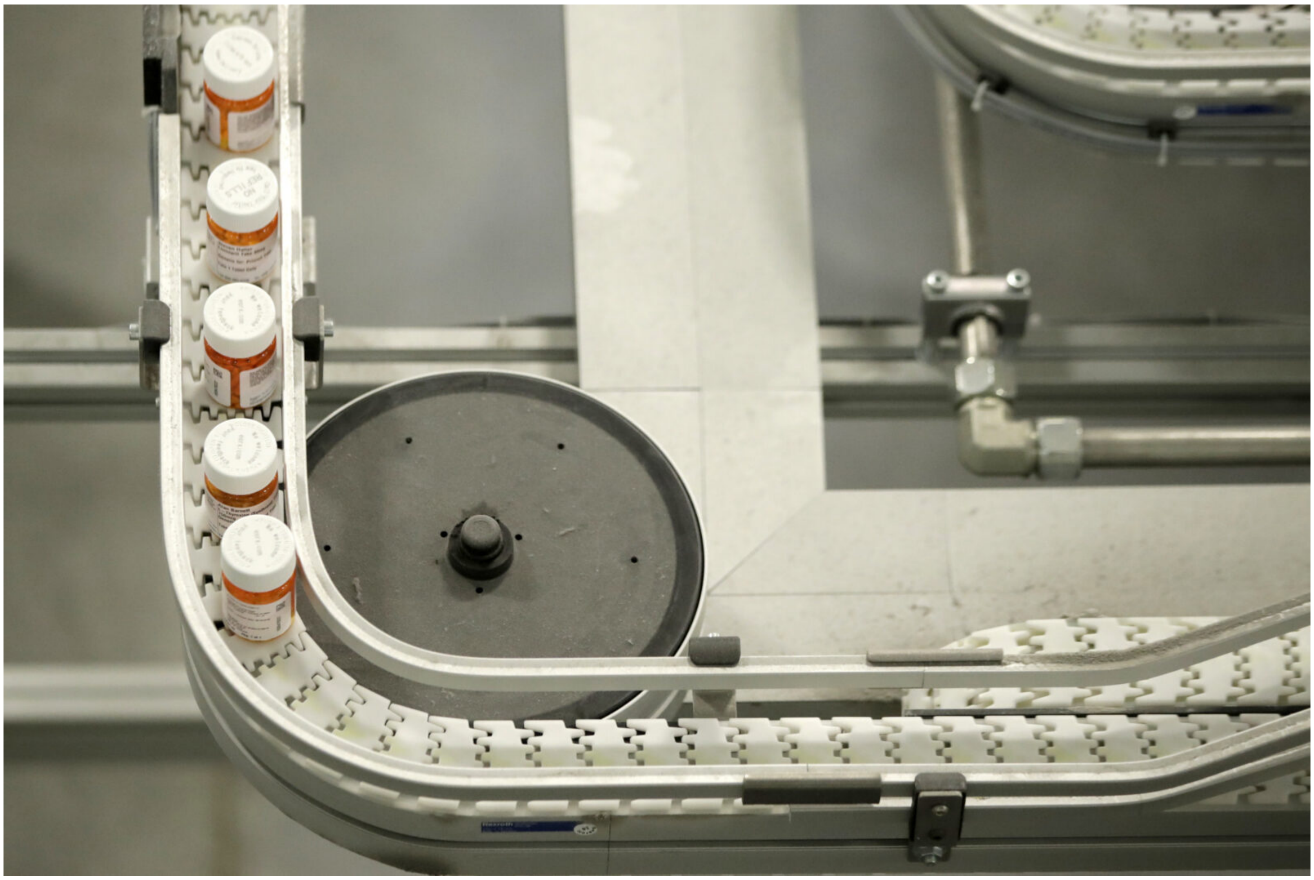
Mercer, which is part of Marsh McLennan, directed STAT to an online compliance document[25] that outlined the different types of compensation it receives and the conflicts of interest it will disclose. A spokesperson said in a statement the company's "policies are designed to comply with compensation disclosure laws … our policies require us to disclose to clients all direct and indirect compensation we receive in connection with providing services to a [self-insured] health plan. Mercer's pharmacy consulting services are compensated by fees paid by the client pursuant to Mercer's contract with the client."

Gallagher and Willis Towers Watson refused to answer written questions. All four companies declined interview requests.

The PBMs also said they don't pay consultants — but with caveats. OptumRx, for example, said it "does not pay consultants for access to business interests." The spokesperson didn't respond to STAT's request for a definition of "access to business interests."

Express Scripts, through a Cigna spokesperson, said it "does not pay brokers or consultants on its own behalf." The spokesperson didn't respond to follow-up questions about what "on its own behalf" meant.

CVS did not submit responses to written questions. All three declined interview requests.



An Express Scripts warehouse in Florence, N.J. *Julio Cortez/AP*

The other two PBMs also offered a separate explanation for why they might pay consulting firms. Express Scripts and OptumRx said in statements they pay consultants if employers ask them to pay the consultants. For example, employers can choose to build the amounts they owe their consultants into PBM invoices. But that compensation does not cover the "indirect" flows that PBMs may otherwise give to consultants, separate from employers. The PBMs did not answer questions about any other types of compensation that they may have paid, and whether the PBMs encourage employers to pay fees to the consultants beyond what employers are already paying.

"Express Scripts never pays brokers or consultants for referrals or for influencing the placement of business, and brokers and consultants only represent the interest of their clients," the Cigna spokesperson said about Express Scripts. "If any of our clients direct us to pay fees to independent benefits consultants, the payment is made through the client's funds. These fees are always fully transparent, auditable, and in compliance with regulatory guidelines."

"Consultants may be hired — and paid — by clients to handle benefit procurement," an OptumRx spokesperson said. "In those instances where a client retains a consultant or broker to handle benefit procurement, the client may direct the PBM through contract to collect money and distribute fees to the consultant or broker on the client's behalf. In any such instance, OptumRx is strictly a facilitator or manager for this payment from the client. We provide all fee disclosures as part of every contract."

OptumRx also told STAT in a statement "in some cases, clients may compensate their consultant a per-prescription fee." The company sent a revised statement later that day, without prompting, that did not include that line.

Several people who work in this niche of health care said the ties between consulting houses and PBMs are nearly identical to the conflicts of interest that government regulators and watchdogs found several years ago within company retirement plans. Companies that help manage the 401(k) accounts of an employer's workers received "revenue-sharing payments" from investment funds — and higher payments created a bigger incentive to choose those funds.

"Because of these conflicts of interest, the service provider may suggest funds that have poorer performance or higher costs for participants compared with other available funds," the Government Accountability Office concluded in a 2011 report[27].

The insurance industry itself also ran into similar problems with "contingent commissions." Insurers pay contingent commissions to brokers who bring the insurer a big group of profitable policyholders. New York banned the biggest consultants from accepting them for several years in the 2000s. Regulators compared them to kickbacks that undermined a firm's impartiality. However, the ban was lifted in 2010, and the big brokerage firms started accepting them again[28].

"There were abuses that were cleared up in the retirement business," said David Fields, CEO of the PBM Navitus. "It still exists today in the PBM world."

The federal government at least became aware of this problem a decade ago when the Department of Labor convened a hearing[29] that specifically discussed conflicts of interest in drug benefits contracts. One company's benefits executive testified that consultants "frequently have preferred relationships with certain PBMs, which may call into question the consultants' independence." Another testified that "PBMs use different price schedules to increase the compensation paid to consultants when the consultant's client base with the PBM increases."

Additionally, in 2019, a ProPublica story[30] detailed the lavish prizes and commissions that health insurance companies paid to brokers to sign up employers. That story, together with the prior federal testimonies and an old proposed regulation[31] on fee disclosures, helped inspire Section 202 of the Consolidated Appropriations Act (CAA) that passed at the end of 2020, according to a lobbyist who was familiar with the origins of the law. The CAA is better known for its Covid-19 relief funds and provisions that prohibit many types of surprise medical bills[32].

Under Section 202, Congress and President Biden amended the Employee Retirement Income Security Act, or ERISA — the sweeping federal law that dictates how employers act as "fiduciaries[33]" and therefore must be prudent with the health benefits they provide to their workers. The new law requires employers to find out how much money their vendors are making behind the scenes and to make sure it is "reasonable." The law specifically applies[34] to the indirect and direct compensation that brokers and consultants may receive for "pharmacy benefit management services."

However, it appears many companies may not be compliant — and almost none are willing to talk about it.

"There are a large number of fiduciaries that are not really even aware of [the new federal law], or if they are aware, they don't fully understand what the law requires," Holmes said. "They are not doing enough to properly screen their consultants."

The law went into effect at the start of 2022. To get a sense of compliance, STAT reached out to 20 of America's largest employers: Amazon, Apple, Bank of America, Boeing, ExxonMobil, FedEx, Ford, GM, Google, Home Depot, IBM, JPMorgan, McDonald's, Microsoft, PepsiCo, Starbucks, Target, UPS, Walmart, and Wells Fargo.

None of the companies agreed to interviews with benefits executives. Most didn't even respond, or declined to comment. Only two companies sent along any type of statement.

A Boeing spokesperson said, "Boeing works diligently to ensure our employee benefit plans are in compliance with all applicable laws and regulations, and similarly, we require our service providers to contractually agree to comply with all applicable laws and regulations."

UPS has contacted its brokers and consultants about disclosing compensation, a spokesperson said. UPS declined to explain further, saying UPS operates its health plans "in compliance with the CAA and other applicable laws."

The Department of Labor, which oversees all compliance with ERISA, did not respond to multiple requests from STAT asking about compliance data among employers and whether the government had penalized any companies for not following the law.

The lack of response from corporate America is hardly surprising to those who have worked within it. Alex Jung, a retired accountant by training who used to be a medical and pharmacy benefits consultant at Mercer, Willis Towers Watson, and Aon, led a webinar earlier this year talking about the CAA and compensation disclosure among drug benefits consultants. She polled more than 40 benefits executives who attended.

"When I asked them how many had complied [with the new CAA requirements], not one raised their hand," Jung said.

In instances where employers actually have asked consultants about any fees they get from PBMs, consulting firms have issued letters to employers that make it appear they are complying with the law's disclosure requirements. But many are using "evasive caveat language," said Holmes, the attorney with Williams Barber Morel. He has seen letters in which the consulting firm says it doesn't take compensation from a PBM that "directly relates to the plan" or that is "related to the consultant's services to the plan."

"It would be easy for a consulting firm to draft a crystal-clear statement that just comes out and says, 'We do not receive any money from the PBMs, period,'" Holmes said. "There shouldn't be any additional language. But I haven't seen a single consulting firm issue a broad disclaimer that just has that simple sentence in it."

Exasperated, Holmes added: "It seems nobody wants to talk about it."

About the Author

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Bob Herman is a business of health care reporter at STAT. He covers hospitals, health insurance, and other corners of the industry — with a goal of explaining and shining light on the massive amount of money flowing through the system.

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