

December 23, 2008

Chairman William Kovacic
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, D.C. 20580

Re: CVS/Caremark Merger

Dear Chairman Kovacic,

As you know in March 2007, CVS, the largest drug store chain, acquired Caremark, one of the three largest Pharmacy Benefit Managers (“PBMs”). I am writing to bring to your attention several recent actions by CVS Caremark that may diminish pharmacy competition and also violate the privacy rights of patients covered by Caremark. We believe these actions may be violations of Section 5 of the FTC Act, and the original acquisition may be a violation of Section 7 of the Clayton Act. We request the opportunity to meet with you and your staff to discuss the need for an investigation of CVS Caremark’s conduct.

Competition Concerns

As the Commission staff knows, a PBM plays a critical role in both gathering information from and providing information to the subscriber. Moreover, the PBM often determines critical issues in determining the benefit plan, including the amount of the copay and when it is applicable. When a giant PBM is owned by a pharmacy there is the ability and incentive for the pharmacy to misuse this relationship to diminish competition among non-CVS pharmacies. With the substantial market share CVS possesses in numerous markets, such conduct may raise significant competitive concerns.

Some of the recent conduct by CVS Caremark that raises these concerns include:

- CVS Caremark has significantly reduced the copay for members when they fill their long-term prescriptions at CVS pharmacies. This clearly raises the costs for members for using non-CVS pharmacies;
- CVS Caremark has adopted a program to attempt to steer consumers to CVS pharmacies. When a Caremark member fills a prescription at a CVS pharmacy, the CVS pharmacist is informed through the Caremark electronic system of whether the recipient uses another non-CVS pharmacy. In those situations, the CVS pharmacist is instructed to inform the consumer of the dangers of using multiple pharmacies. Obviously the only way the CVS pharmacists knows the consumer uses multiple pharmacies is through the misuse of consumer information possessed by Caremark; and
- CVS Caremark co-brands its prescription drug card in such a fashion to confuse consumers that the benefit card can only be used at CVS.

We, of course, are not aware of the full range of practices CVS may engage in to use its ownership of Caremark to disadvantage rivals and diminish pharmacy competition. However, the recent institution of some of these practices may suggest that CVS is trying to use Caremark to increasingly dampen competition in the retail pharmacy market.

We recognize that pharmacy chains have owned PBMs for some time; in fact CVS owned a PBM prior to its acquisition of Caremark, and Walgreens has its own PBM. The question may arise why an integrated pharmacy chain/PBM has not engaged in this conduct at some earlier point. The answer is straightforward: the PBMs owned by the chains in those instances were relatively small and thus the vertical integration between chain and PBM did not offer a significant opportunity for the type of exclusionary conduct described above.

Privacy Concerns

As the Commission is well aware both pharmacy chains and PBMs possess a wide variety of personally sensitive information about PBM members. Consumers are particularly vulnerable to misuse of the data because they do not have a direct relationship with the PBM and may be unaware how their personal information is being used. A recent report by Change to Win highlights how CVS Caremark takes advantage of the lack of transparency in their patient relationship to ruthlessly mine data, engaging in a broad spectrum of questionable practices to obtain and misuse patient information.¹

- Many CVS Caremark contracts include provisions that allow the PBM to use patient information “in any manner it deems appropriate” as long as not specifically prohibited by law.² These clauses allow CVS Caremark to sell patient names and prescription records to third parties like health and life insurers who can then use that data to deny coverage or raise premiums;³
- Through a provision in contracts with some plan sponsors, CVS Caremark is allowed to use the data it gets from free discount card-holders to create marketing materials, get manufacturer rebates and promotions that it does not have to disclose, and sell patient information with no restrictions;⁴
- CVS Caremark also recently introduced a new prescribing program, iScribe, which is marketed to physicians as an electronic prescription manager. A physician registering with the program automatically gives CVS the right to “collect Transaction data” – including the patient’s name, address, phone number, date of birth, gender, and prescription data – and sell it to third parties.⁵

¹ Change to Win report, “CVS Caremark: An Alarming Prescription.”

² Change to Win report, “CVS Caremark: An Alarming Prescription,” p 15

³ Change to Win, p 16. See also Terhune, Chad. “They Know What’s in Your Medicine Cabinet,” Business Week, 7/23/08

⁴ <www.businessweek.com/magazine/content/08_31/b4094000643943.htm?chan=top+news_top+news+index_news+%2B+analysis>

⁴ CtW report p 18

⁵ CtW report p 17

These are three examples of how CVS Caremark uses contracts and purported bonus services to secretly obtain specific patient data for its own profit, regardless of the harm to its customers.

In addition to inappropriately selling data the data it gathers, CVS uses personal information to restrict competition by using the data to engage in deceptive marketing practices, often in the form of letters to doctors and patients masquerading as prescription drug education. “The RxReview” program is a prime example of this kind of problematic behavior. Under this program, CVS Caremark sends materials to physicians with specific patient information – full names and prescription history – suggesting that the doctors switch these patients to a different drug. The letters do not disclose that the suggested drugs are often more expensive to the patient’s plan but offer a higher rebate or kickback to CVS Caremark, nor do they explain that the mailing has been financed by the manufacturer of the suggested drugs.⁶ RxReview began under Advance PCS, which was acquired by Caremark in 2004, and was the subject of an extensive federal false claims investigation in 2001. However, CVS Caremark has continued the program, along with others like it:

- In October 2007, a Massachusetts judge condemned CVS for advising patients to switch drugs in a direct-to-consumer mailing that was secretly financed by manufacturers and by which CVS profited.⁷
- In June 2008, CVS Caremark sent a letter to one doctor urging that physician to switch several patients – mentioned specifically by name, patient identification number, and date of birth – to Januvia, a Merck diabetes medication that costs between 5 and 11 times more than other comparable treatments.⁸

CVS Caremark may be misusing confidential information by selling mailing rights to manufacturers and convincing patients to switch to drugs with better rebates for the PBM; indeed, the Advance PCS investigation found that the RxReview program reaped profits of about \$40 million in one year.⁹ These programs show a disregard for patients’ privacy concerns – and they are especially troubling in light of recent accusations that multiple CVS retail stores have been convicted in Indiana, Texas, and California of disregarding patient privacy concerns by improperly disposing of patient files.¹⁰

We look forward to discussing this with you further. Please let us know if you have any questions.

Sincerely,

⁶ CtW report p 16

⁷ *ibid*

⁸ Marley Seaman, “Unions Accuse CVS Caremark of Pushing Merck Drug,” *Forbes* 11/14/08, <<http://www.forbes.com/feeds/ap/2008/11/14/ap5696569.html>>

⁹ CtW report p 16

¹⁰ CtW report p 18

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