



U.S. PIRG

January 10, 2012

The Honorable Jon Leibowitz
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: Proposed Merger of Express Scripts, Inc. and Medco Health Solutions

Dear Chairman Leibowitz,

We, the undersigned, are the nation's leading consumer advocacy groups committed to protecting the public interest in competitive markets.¹ We wrote to you previously to express our opposition to Express Scripts' proposed acquisition of Medco Health Solutions in light of the deal's potential for significant consumer harm. We commended the Commission for issuing a second request and ensuring that this deal, and the concerns of consumers, will be carefully and adequately reviewed.

We write you today to address a common misperception that we believe, if left unresolved, could significantly misguide the Commission in their investigation of this proposed merger. Our message is plain: health plans are inadequate representatives of the interests of the ultimate consumer. The mere fact that some health plans may not complain about the merger does not suggest that consumers will not be harmed. (Indeed some major health plans have complained.)²

Undoubtedly the ability to manage health care costs is critical for health plans and consumers and PBMs have the potential for aiding that process significantly. However, any

objective perception of the results of PBM activity over the past several years would shed serious doubt on whether these entities consistently act in the interest of the ultimate consumers and whether health plans are in position to effectively protect consumers against anticompetitive, deceptive, or fraudulent conduct.

Facing weak transparency standards, the big three PBMs have frequently engaged in a wide range of deceptive and anticompetitive conduct that ultimately harms and denies benefits to consumers. Some PBMs secure rebates and kickbacks in exchange for exclusivity arrangements that may keep lower priced drugs off the market. PBMs may switch patients from prescribed drugs to an often more expensive drug to take advantage of rebates that the PBM receives from drug manufacturers. In the past six years alone, a coalition of over thirty state attorneys general have brought cases attacking unfair, fraudulent and deceptive conduct by each of the major PBMs including Express Scripts and Medco. Between 2004 and 2008, the three major PBMs have been the subject of major federal or multidistrict cases over allegations of fraud; misrepresentation to plan sponsors, patients, and providers; unjust enrichment through secret kickback schemes; and failure to meet ethical and safety standards. These cases resulted in over \$371.9 million in damages to states, plans, and patients so far. PBMs have repeatedly acted in opposition to the interests of consumers and yet, the health plans have played no role in this effort to protect consumers. That is why government enforcement action was necessary in those cases and is needed here.

There appears to be a common misperception that health plans are able to effectively represent the consumer interest and alter the anti-consumer conduct of PBMs. We do not believe that is the case currently and is even less likely to be true if this anticompetitive merger is approved. Health plans often have distinctly different interests than their subscribers, and thus have not been adequate protectors of consumer concerns. When consumers are victimized by anticompetitive, fraudulent, or deceptive conduct by PBMs, they cannot easily change health plans in response. Nor are health plans particularly sensitive to these complaints and the PBM and plan may simply blame each other leaving the consumer with little or no recourse.

Moreover, health plans may be insensitive to higher costs to consumers, in either higher out of pocket costs or lower quality of service. Many health plans that encounter unreasonably high expenses in their interactions with PBMs simply pay them, and then pass on these costs to consumers in the form of higher premiums. As the PBM market continues to consolidate, health plans will only become less able to protect consumers. This merger will create a dominant PBM with the market power and leverage to effectively force plans into restricted networks that will ultimately harm consumers.

In addition to lacking adequate incentives to fully protect consumers, health plans generally select the PBM plan with the highest alleged cost savings, and fail to consider carefully the quality, service and access preferences of its beneficiaries. For example, PBMs entice health plans to select mandatory mail options even though such a requirement is not preferred by plan beneficiaries. PBMs make it appear that the mail option reduces costs, but the lack of transparency makes this doubtful, particularly when PBMs refuse to allow community pharmacies the opportunity to fill prescriptions at the same rate. Similarly, PBMs often require use of their own specialty pharmacies rather than allowing beneficiaries' access to their trusted

community pharmacist. Other PBM policies, including inadequate reimbursement for pharmacy care services deny patients access to critical care. While most health plans have certain coverage requirements, they are often drafted in a manner that fails to protect many of the most vulnerable and underserved beneficiaries.³ This merger, which will create a dominant PBM, will place health plans in an even more vulnerable position in trying to protect consumers.

As the Commission's own Guide to Antitrust Laws states, "The FTC's Bureau of Competition, working in tandem with the Bureau of Economics, enforces the antitrust laws for the benefit of consumers."⁴ Therefore, as steward of the American consumer, we ask that the Commission—particularly in their investigation of the Express Scripts/Medco merger—focus on the impact of the ultimate consumer, and not just the health plan.⁵ We believe it would be detrimental to an adequate investigation to assume that, with respect to PBMs, health plans will represent and effectively protect the services valued by consumers. This merger will cause significant harm to millions of consumers and should be enjoined.

Please feel free to contact us with any questions or for additional information.

Sincerely,

**Consumer Federation of America
Community Catalyst
U.S. PIRG
National Consumers League
NLARx**

Commissioner J. Thomas Rosch
Commissioner Edith Ramirez
Commissioner Julie Brill
Director of Bureau of Competition Rich Feinstein
Director of Bureau of Economics Joe Farrell

¹About our organizations:

Community Catalyst is a national non-profit consumer advocacy organization that collaborates with organizations in over 40 states to achieve wide-reaching federal and state health care reforms in many areas, including prescription drug access and quality.

The Consumer Federation of America (CFA) is composed of over 280 state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power and cooperative organizations, with more than 50 million individual members. CFA represents consumer interests before federal and state regulatory and legislative agencies, participates in court proceedings and conducts research and public education.

NLARx is a nonpartisan, nonprofit organization founded and directed by state legislators. Our mission is to assist legislators who seek to work jointly across state lines to make prescription drugs more affordable and accessible to people in the United States, especially by reducing prescription drug prices.

The National Consumers League is America's oldest consumer organization, representing consumers and workers on marketplace and workplace issues since 1899. NCL provides government, businesses, and other organizations with the consumer's perspective on concerns including child labor, privacy, food safety, and medication information.

U.S. PIRG, the federation of state Public Interest Research Groups (PIRGs), stands up to powerful special interests on behalf of the American public, working to win concrete results for our health and well-being. With a strong network of researchers, advocates, organizers and students in state capitols across the country, we take on the special interests on issues, such as product safety, political corruption, prescription drugs and voting rights, where these interests stand in the way of reform and progress.

² The National Coordinating Committee for Multiemployer Plans, an AFL-CIO umbrella group covering over 26 million Americans, has come out in opposition to the merger.

³ For example, a stipulation that 95 percent of beneficiaries must be within a certain amount of miles of a pharmacy.

⁴ FTC Guide to the Antitrust Laws, available at, <http://www.ftc.gov/bc/antitrust/index.shtm>.

⁵ For more details on what we believe the impact of the proposed ESI/Medco deal may have on consumers and the valued services that may be lost as a result of the deal, please consult our September 2011 letter to the Commission, *attached*.