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Congress of the United States
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August 25, 2009

The Honorable Jon Leibowitz
Chairman
Federal Trade Commission
600 Pennsylvania Avenue N.W.
Washington, DC 20580

Dear Chairman Leibowitz:

I am writing to ask the Commission to investigate what appears to be anticompetitive and deceptive conduct by CVS/Caremark. As you know, the FTC approved CVS' acquisition in November 2006 without issuing a Second Request. The merger combined the largest pharmacy chain with the largest Pharmacy Benefit Manager. CVS has over 6200 stores and Caremark manages the pharmacy benefits for over 130 million people. As documented below, I believe the merger has led to significant harm to consumers and the acquisition and attendant harmful conduct should be investigated.

In March 2007, the merger of CVS and Caremark brought together the country's largest retail pharmacy chain and the largest PBM.¹ The combined company fills or manages more than 1.2 billion prescriptions annually and has relationships with over 150,000,000 consumers – one of every two Americans. CVS Caremark is the largest provider of prescriptions in the United States and has over 6,900 retail drugstores. Caremark, its PBM, is more than twice the size of the next largest PBM in individuals covered. Despite the size of the merged company, the FTC cleared CVS's acquisition of Caremark without even issuing a second request for information or conducting a substantial investigation.

It is my understanding, based on conversations with pharmacists and recent evidence of abuse in the media, that the merger between CVS and Caremark has negatively affected small businesses and patients in North Carolina and throughout the country. Some of the ways in which patients have been harmed include:

- Consumers have been issued letters stating that they will have higher copays or have no coverage for their drugs unless they consent to transfer their prescriptions to CVS or Caremark mail order;ⁱⁱ
- Non-CVS patients have had their confidential patient data used to fill prescriptions at CVS pharmacies without their knowledge or consent;
- Consumers have been forced to switch from their community pharmacies to a CVS or mail-order pharmacy which cannot serve the specific needs of specialty drug users. In some cases, patients' drug

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regimes require that they take a drug at a specific time or risk ruining their entire treatment. When a mail-order delivery is late, the patient's health is at risk, and plan sponsors are ultimately responsible for thousands of dollars in additional drugs;

- Consumers have been directed by their Caremark-operated Medicare Part D plans to switch their prescriptions to CVS, and have subsequently had their plan charged upwards of 3,800% more for a drug than they were being charged at their local pharmacy. This affected two of my own constituents, a Charlotte couple who found that they risked approaching the “doughnut hole” gap in their Medicare prescription drug coverage because of this deceptive practice.ⁱⁱⁱ

I believe that an investigation of CVS/Caremark may yield further examples of patients and small businesses that have been harmed. Moreover, I believe that the merger of CVS and Caremark has created a vertically integrated firm with the power, incentives and capability to foreclose competition and ultimately harm consumers. Allowing a powerful drug store to use its PBM to raise rivals' costs, steer patients to its own stores and use confidential patient data for marketing is not desirable from either a competition or a consumer protection standpoint.

I recognize that the Federal Trade Commission has the power to reopen mergers after they have been completed. Given the recent evidence of CVS's anticompetitive conduct, and the fact that the CVS/Caremark merger created a single firm that is both the largest pharmacy chain and the largest PBM in the country, I respectfully request the FTC reopen its investigation of the merger to address these concerns.

Sincerely,



Larry Kissell
Member of Congress

ⁱ Sources alternately place Medco and CVS Caremark at the top position in size among PBMs. According to the 2008-2009 HDMA Factbook, CVS Caremark is at the top with 129 million covered lives. In prescriptions managed, a recent edition of *The Wall Street Journal* places Medco first at 796 million with CVS Caremark close behind at 755 million (Fuhrmans, Vanessa “Express Scripts to buy WellPoint unit.” *Wall Street Journal*. 13 Apr 2009).

ⁱⁱ See Armstrong, David and Barbara Martinez. “CVS Appears to Steer Plan Patients to Its Stores,” *The Wall Street Journal*, 13 May 2009.

ⁱⁱⁱ See Garloch, Karen. “Drug Price Disparity Galls Charlotte Couple; they’ll take it to DC.” *The Charlotte Observer*, 14 May 2009.