May 12, 2009

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

Re: The Need for an FTC Investigation of CVS/Caremark

Dear Chairman Leibowitz:

I write on behalf of the National Community Pharmacists Association ("NCPA"). We appreciate the opportunity for numerous community pharmacists to meet with you and your staff on May 13 about anticompetitive conduct by CVS/Caremark and how that conduct both harms consumers and community pharmacies. We believe CVS' recent conduct calls for an extensive investigation of both antitrust and consumer protection concerns, before that conduct results in irreparable harm. This letter sets out some of the facts that will be the basis for our discussions.

NCPA is the leading association for Main Street community pharmacists throughout the United States, representing over 23,000 independent pharmacies and tens of thousands of community pharmacists. Our pharmacists serve millions of consumers every week, dispensing drugs, providing advice on drug utilization and helping consumers deal with the complex systems of drug reimbursement. Consumers value the personalized service and guidance provided by community pharmacists in advising on drug utilization and therapeutic usage. Moreover, community pharmacists enhance the quality of care by developing close patient-provider relationships, often providing crucial services rarely offered by chain pharmacies, such as home delivery, custom packaging, and round-the-clock emergency access. Community pharmacies often serve underserved rural and inner city markets, where there are few if any chain pharmacies.[1]

As you know in December 2008, NCPA wrote to former Chairman Kovacic about our concerns over CVS' conduct. Since that time NCPA has been soliciting information from both consumers and community pharmacies about CVS' conduct. To date, we have heard from over 200 consumers and pharmacies in 43 states. The interviews we have conducted document a clear pattern of anticompetitive conduct that increases costs to consumers and reduces their choices, as well as apparent violations of consumer privacy.

Background

[1] See Appendix A: "Value of the Community Pharmacist"

In March 2007, CVS, the nation's largest retail pharmacy, merged with Caremark, the nation's largest Pharmacy Benefits Manager. The resulting prescription giant operates more than 6,800 pharmacies, with the number one or two market share in each of the country's top ten markets, with a market share as high as 47%. Caremark is the largest PBM and covers 134 million lives (more than twice as many as any other PBM). **The combined company dominates the pharmaceutical services industry, filling or managing more than 1.2 billion prescriptions annually and servicing an estimated 1 out of 2 Americans.**

By controlling Caremark, CVS has access to the most competitively sensitive information of rival pharmacies including the identity of their customers and prescribers, the drugs prescribed, the cost of the drugs, the amount of drugs acquired, the drug acquisition cost, and the reimbursement amount. By owning Caremark, CVS controls reimbursement for a substantial segment of reimbursement for its rivals. As far as we know, in no other industry does a rival have this type of control or access to this type of information of its rivals.

CVS is using Caremark to eliminate consumer choice and drive consumers from rival pharmacies. In recent months, CVS has embarked on a strategy of using the Caremark's PBM business to drive customers from independent and small chain drugstores to CVS stores. The conduct used to drive customers to CVS includes:

- Implementing a so-called "Maintenance Choice" program which forces consumers who use rival pharmacies to move their prescriptions to CVS stores or mail order or pay an increased co-pay. In some cases the so-called Maintenance Choice program has raised the costs to consumers by 900%;
- Cobranding "CVS Caremark" benefits cards in a confusion fashion, which makes customers (especially vulnerable elderly patients) believe they can only use their benefits card and fill prescriptions at CVS stores;
- Sharing Caremark confidential patient information with CVS to enable CVS pharmacists to call non-CVS customers at home and direct them to fill their prescriptions at CVS stores; and
- Creating obstacles for consumers trying to fill prescriptions at non-CVS pharmacies.

This conduct is anticompetitive and, we believe, violates Section 5 of the FTC Act, Section 7 of the Clayton Act, and Section 2 of the Sherman Act.

- Section 5 of the FTC Act prevents "unfair methods of competition" which may harm competition, including conduct that excludes competitors on a basis other than efficiency that harms consumers. As detailed below, CVS Caremark's conduct violates the FTC Act by restricting consumer choice and forcing consumers to pay higher prices.
- Section 7 of the Clayton Act prohibits acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." CVS' acquisition of Caremark violates Section 7 because it

diminishes competition among pharmacies, by allowing CVS to engage in exclusionary conduct that drives consumers to CVS stores and mail order. This raises the costs of rival pharmacies, diminishing their ability to compete, ultimately leading to higher prices and reduced choice. The acquisition also gives CVS Caremark access to information of its PBM and pharmacy rivals, which may facilitate collusion.

- Section 2 of the Sherman Act prevents unlawful monopolization or attempts to monopolize. CVS' conduct threatens to monopolize several pharmacy distribution markets, by raising the costs of its rivals and other exclusionary tools.

CVS' conduct is inconsistent with its commitments when it acquired Caremark. The FTC cleared CVS' acquisition of Caremark in November 2006 without issuing a Second Request. We do not know what basis the Commission had for closing the investigation or what representations CVS made about the impact of the merger on consumers or other pharmacies. Nor do we know if CVS agreed to implement a firewall to prevent sharing of confidential information or what the terms of any firewall might have been. In any case, CVS has violated the public commitments the company made at the time of the merger:

- When the companies announced their merger, they promised consumers "unparalleled access" and "greater convenience and choice," pledging that "Caremark customers could continue to use any pharmacy they choose within their networks" and that consumers would have "more control over choice, access and how they spend their healthcare dollars." **CVS Caremark specifically promised, *"we're going to be agnostic to where the consumer fills their prescription*."**

- By forcing consumers to move their prescriptions, CVS Caremark has violated those commitments. By designing confusing benefits cards and misusing customer claims information to steal customers of rival pharmacies, CVS Caremark has shown that it is not "agnostic" about its patients' choice of pharmacy. And by implementing restrictive plans, CVS Caremark has reduced consumers' choice and raised prices. **CVS Caremark's strategy harms consumers by diminishing access to lower cost and higher quality pharmacy services.**

Moreover, CVS' conduct is often inconsistent with their commitments to their PBM customers. Some of the efforts by CVS to switch consumers to CVS stores are done without the permission or request of the plan sponsors.

We have received several hundred complaints from consumers and pharmacists for the past few months and have attached a document that summarizes those complaints. The document includes direct quotes from consumers and pharmacies harmed by this conduct.[2] Briefly, CVS' conduct harms consumers directly and indirectly and causes significant anticompetitive effects, including:

- consumers pay higher co-pays if they want to use the pharmacy they traditionally use;
- diversion of prescription business from non-CVS retail pharmacies to CVS pharmacies or CVS mail order, even if customers may have otherwise chosen a rival pharmacy based on lower prices, better service, a more convenient location, or other factors;
- competing retailers are foreclosed from filling prescriptions for members of plans serviced by Caremark, raising their costs to service other PBMs;
- consumers steered to CVS retail pharmacies may pay more for front end products, on which CVS secures even higher profits than on pharmacy products;
- CVS uses its control of Caremark to force rival pharmacies to accept reimbursements for prescriptions so low that they cannot afford to dispense certain drugs to Caremark-covered patients; and
- CVS Caremark's actions severely curtail patients' access to drugs, especially specialty pharmaceuticals that require special handling. Moreover, many pharmacists predict that they will become financially inoperable if they continue to lose "Maintenance Choice" prescriptions to CVS, leaving many rural and inner city communities underserved.

This is only the beginning of potentially even more harmful conduct. The Maintenance Choice program was implemented only in December and CVS plans to continue to expand the program. Moreover, if not investigated CVS may design new means to use the CVS Caremark relationship to harm competition and consumers. Consumer advocacy groups as well as state legislators have recently weighed in on the need to investigate CVS Caremark for potential anticompetitive conduct, citing similar concerns.[3]

An investigation and enforcement actions is consistent with past Commission enforcement actions. During the 1990s, PBMs were acquired by pharmaceutical manufacturers – another form of vertical integration. The FTC brought enforcement actions against Lilly's acquisition of PCS and Merck's acquisition of Medco. As you know, the Medco acquisition was consummated in 1993 and the FTC reopened its investigation in 1995, ultimately bringing an enforcement action in 1998. Both the Lilly/PCS and Merck/Medco enforcement actions alleged that through vertical integration there were competitive concerns of (1) foreclosure – that rival drug manufacturers might find access to the market limited, and (2) collusion – that the integration might facilitate collusion between manufacturers or PBMs. Moreover, the enforcement actions raised the concern that through these vertical acquisitions, Medco or

[2] See Appendix B, "CVS Caremark: Raising Costs, Limiting Access, and Choking Competition." Reports from pharmacies and consumers collected between January 1, 2009 and May 8, 2009. Patient and pharmacist names are changed to protect privacy.

[3] See Appendix C, "Consumer Groups' Letter to Chairman Jon Leibowitz on CVS Caremark" and Appendix D, "NLARx Letter to Chairman Jon Leibowitz on CVS Caremark."

PCS would be eliminated as an independent negotiator of pharmaceutical prices and this could potentially lead to higher drug prices.

We believe CVS' acquisition of Caremark presents the same concerns. Through its acquisition, CVS can raise the costs of rival pharmacies, by decreasing reimbursement, shifting consumers through Maintenance Choice and other cost raising strategies, and engaging in egregious auditing activities. CVS can raise the costs of rival PBMs by making their access to non-CVS pharmacies more costly. CVS' access to the most sensitive business information of its rivals offers a fertile medium for potential collusion. Finally, CVS' ownership of Caremark eliminates its ability and incentive to be an independent negotiator of drug prices – despite its commitment to be "agnostic," – CVS clearly uses Caremark to drive transactions away from rival stores.

Consistent with Merck/Medco and other enforcement actions, we urge the FTC to:

- Use both its competition and consumer protection resources to investigate CVS Caremark to attack both anticompetitive and deceptive conduct.
- Consider whether CVS' consummated acquisition of Caremark has reduced competition in the pharmacy and PBM markets, and seek appropriate relief, including imposition of enforceable firewalls and non-discrimination obligations, or divestiture, if necessary.
- Require Caremark to treat all pharmacies in a nondiscriminatory fashion.
- Prohibit CVS from creating programs that disadvantage rivals by imposing higher costs on them.
- Compel CVS to create an ironclad barrier between CVS and Caremark so that competitively sensitive Caremark information cannot be used by CVS.
- Prevent Caremark from sharing personally sensitive information with CVS.

Again, on behalf of the NCPA and the scores of pharmacists who will be visiting you on Wednesday, we are grateful for your time and attention. We look forward to working with the Commission on this important matter.

Sincerely yours,

Holly Whitcomb Henry

Holly W. Henry
NCPA President