The American Consumer Institute
Center for Citizen Research

January 11, 2012

Chairman Jon Leibowitz
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chairman Leibowitz:

The American Consumer Institute Center for Citizen Research is strongly opposed to the proposed merger between pharmacy benefit managers (PBM) Express Scripts, Inc. and Medco Health Solutions, which is currently before your Commission. Approving this mega-PBM merger would only exacerbate the conflicts of interest and concentration of market power that already exist in the PBM industry, and would in no way benefit consumers. Given this, we urge the Commission to carefully review the anticompetitive risks posed by the merger.

Multiple Conflicts Of Interest Already Exist In The PBM Market

PBMs broker agreements on multiple sides - and profit from each. Because they always have better and more complete information on costs and prices than other involved parties involved parties, PBMs have a lop-sided advantage in dealings with the other parties which enables them to profit from managing the health plans sponsored by corporations, governments and unions as well as by funneling sales to preferred drug manufacturers and squeezing concessions from pharmacies for each prescription filled.

For example, PBMs work with drug manufacturers, promising higher volumes of sales in return for discounts and rebates. They derive profit from dealings with manufacturers that are unknown to plan sponsors or pharmacies. They also work with drug manufacturers to change which drugs they offer to patients (formularies) in exchange for higher discounts and kickbacks.

An economist would tell you this asymmetric information represents a market failure, and many would say it requires corrective regulatory and legal remedies. Perhaps more alarming is that the asymmetric information leads to a lack of transparency between the PBM and the party on whose behalf it is working – which means that it is not always clear to consumers who PBMs represent and, therefore, whose interests they work on behalf of. For example, the aforementioned formulary changes increase profits for PBMs, but do not necessarily bring down costs, which shows a clear conflict of interest between what is best for the plan and consumers and what will increase the PBMs' profits.

Yet another conflict of interest arises from PBMs' self-dealings. PBMs like ESI and Medco own their own mail-order prescription services (and if combined, ESI and Medco would

represent 60 percent of this business sector). PBMs can easily capture consumers who regularly obtain the same drug, force them into a mail-order program for that medication, and thus bypass the pharmacy altogether.

PBMs Enjoy Overwhelming Market Power

Profitability is the easiest and most acceptable means of testing market power – and all indications are that the PBM market is very profitable. According to financial reports, between 2005 and 2010, PBMs' earnings before interest and taxes grew at about twice the average rate of its peers in other health care industries. Specifically, data on Medco and Express Scripts show pre-tax profits far exceeding retail pharmacies, wholesalers, pharmaceutical and medical device companies, and managed care organizations. Express Scripts' own company reports show that profits have grown 400 percent in just the past decade. By several measures, PBMs in general - and the merging companies in particular - are highly profitable.

This suggests that, even today, market entry and subsequent competition is insufficient in the PBM market. It indicates existing anti-competitive risks in which incumbents lock up deals and lock out others to the detriment of the consumer.

The Proposed Merger Will Only Exacerbate Existing Market Problems

Today, Express Scripts and Medco are the third and first largest PBMs in the market. A merger between the two would eliminate a large competitor from an already-concentrated market. The combined company would be able to leverage its size to further squeeze pharmacies and drug manufacturers.

In this way, approving the merger would facilitate legal collusion, through which the combined Medco-Express Scripts company could force pharmacies to concede further discounts or risk losing access to an even greater portion of the market.

It is clear what would result: some number of pharmacies would be driven out of the market altogether; additional prescriptions would be forced into the PBMs' mail-order only programs; and consumer choice and access to pharmacies would be diminished. There are no obvious benefits to consumers from this merger, but there are clear risks and likely damages.

For these reasons, the American Consumer Institute Center for Citizen Research is strongly opposed to the proposed Express Scripts-Medco merger, and we urge the Commission to dedicate adequate resources in thoroughly reviewing these anticompetitive consumer risks.

Sincerely,

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