



The American Antitrust Institute

November 9, 2010

Richard A. Feinstein, Esquire
Director
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

David Vladeck, Esquire
Director
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: CVS Caremark

Dear Richard and David:

The American Antitrust Institute (“AAI”) understands that both of your bureaus are investigating allegations from both industry and consumer sources that CVS Caremark has been using its dominant pharmacy benefits manager (“PBM”) business in various ways that improperly benefit its dominant retail pharmacy business and thereby suppress competition in retail pharmacy markets across the United States. The alleged practices include (a) manipulation of the Caremark “Maintenance Choice” program to force consumers into purchasing their drugs at CVS stores, (b) misuse of private patient information from the Caremark business to steer consumers into CVS stores, and (c) misuse of Caremark auditing processes to raise costs of and otherwise disadvantage rival pharmacies. We are not privy to the evidence regarding these allegations. But, if there is credible evidence that these practices are occurring, the AAI respectfully urges that the Commission proceed forcefully against CVS Caremark to stop them for the reasons summarized below.

First, if these practices are now occurring, they raise an important Section 7 question: why, in the course of the 2007 HSR review of the then-proposed CVS-Caremark merger, the Commission did not foresee a likelihood that the merger would create both the ability and the incentive of the combined firm to act in this manner? That surely would have warranted a challenge and, at a minimum, conditioning clearance upon consent-order safeguards against such conduct as the Commission did in the case of similar PBM-related combinations in the 1990s (Merck/Medco, Lilly/PCS). But, without any need to find fault with the decision-making three years ago, evidence that this conduct is now occurring would clearly establish that the merger did in fact enable and incent the combined firm to engage in this conduct. That, in turn, would warrant reopening the merger investigation, challenging the merger today on the ground it has proven to be anticompetitive, and consideration of a divestiture remedy.

Second, evidence that these practices are occurring would be a sound basis for a Commission challenge to them as both antitrust violations under the “unfair methods of competition” prong and consumer protection violations under the “unfair practices” prong of Section 5 of the FTC Act. Indeed, this would be an important opportunity to develop and confirm

Section 5 law as broader than other antitrust statutes in its ability to reach single-firm exclusionary conduct in its incipiency -- even, for example, before it reaches the stage of monopoly or near-monopoly power in the affected market or markets. And, particularly given the alleged disregard of consumer privacy expectations and the role of that abuse in the alleged overall scheme, this could also be an important opportunity to demonstrate synergies in coordinated uses of the Commission's antitrust and consumer protection authorities in support of both agency missions. Here, if the evidence supports the allegations, serious diminution of consumer choice would be a common feature of both the alleged unfair methods of competition and the alleged unfair practices. Such an action would thereby highlight the importance of consumer choice concerns in the development of Section 5 law generally.¹

Thank you for considering the AAI's perspectives.

Sincerely,

A handwritten signature in black ink that reads "Albert Foer". The signature is written in a cursive, flowing style.

Albert Foer
President
The American Antitrust Institute

¹ See Robert H. Lande, Revitalizing Section 5 of the FTC Act Using “Consumer Choice” Analysis, 8 Antitrust Source 3 (February 2009); Neil W. Averitt & Robert H. Lande, Using the “Consumer Choice” Approach To Antitrust Law, 74 Antitrust L.J. 175 (2007); Neil W. Averitt & Robert H. Lande, Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law, 65 Antitrust L.J. 713 (1997); see also Robert A. Skitol, How BC and BCP Can Strengthen Their Respective Policy Missions Through New Uses of Each Other’s Authority, 72 Antitrust L.J. 1167 (2005).