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February 23, 2012

The Honorable Jonathan D. Leibowitz
Chairman
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Dear Chairman Leibowitz:

I write concerning the proposed merger between Express Scripts, Inc. and Medco Health Solutions, Inc., which is currently under review at the Federal Trade Commission ("FTC"). On December 6, 2011, the Subcommittee on Antitrust, Competition Policy and Consumer Rights, of which I am the Ranking Member, held a hearing on this proposed merger. This letter represents a brief statement of my views on the merger based on testimony given and information provided at that hearing.

Express Scripts and Medco are two of the largest pharmacy benefit managers ("PBMs") in the country, and their proposed merger is without question a significant transaction. PBMs perform an essential function within the healthcare system, serving as intermediaries between health plan sponsors, such as large private or government employers, and pharmacies that disburse drugs to the beneficiaries of those health plans. PBMs help lower the price of prescription drugs for health plan sponsors (and hence, consumers) by negotiating with pharmacies for favorable prescription drug prices, seeking reimbursements and concessions from drug manufacturers, reducing the drug costs of routine medications through mail order disbursement, and implementing programs to increase patient adherence to medication regimens. In performing this role, PBMs manage the vast majority of drug prescriptions throughout the United States.

The merger of these PBMs may pose some risks to the market's competitive balance but overall has the potential to create meaningful efficiencies and provide significant savings for consumers. Any resulting anticompetitive effects for community pharmacies would be of special concern to me in light of the important service those small businesses provide to rural and otherwise underserved residents in my State and throughout the country. I have confidence that the FTC will closely examine concerns some have expressed that the merger could create difficulties for community pharmacies in their interactions with PBMs.

The antitrust analysis for the merger will ultimately depend on defining the relevant markets and identifying objective estimates for the combined entity's market share and potential market power within those properly defined markets. Even assuming their validity, many of the (highly contested) criticisms of PBMs, including allegations that they lack transparency and do not pass along cost savings to health plan sponsors, are relevant to the antitrust analysis only insofar as the market for PBMs will not remain sufficiently competitive to ensure properly operating market forces. Our Subcommittee heard significant testimony, including from a prominent health plan sponsor, to the effect that the PBM market is indeed competitive and may only become more so as burgeoning mid-size PBMs grow in size and sophistication. Moreover, even among large health plan sponsors, there is evidence that the PBM market is robustly competitive, with over 20 PBMs servicing the contracts of companies within the Fortune 500. I am not aware of significant evidence that this merger will result in decreased competition among viable PBMs able to service most companies and accounts.

In addition to identifying the relevant market share figures with care, an objective analysis must include meaningful attention to the pro-competitive benefits that may result from this transaction. The combined entity may produce significant cost savings for health plan sponsors by means of its increased bargaining power and its improved tools for closing gaps in care, promoting adherence to medications, and overall disease management. There is good reason to believe that market forces will ensure cost savings are passed on to consumers. Specifically, contracts between PBMs and health plan sponsors require that the vast majority of savings obtained by PBMs be passed on to the plan sponsor, and thus to the consumer.

In light of what is at stake, I expect the FTC to review this transaction carefully and thoughtfully, and am confident it will do so. In reviewing this proposed transaction, it is vital to remember that the antitrust laws are not intended to protect competitors but rather to serve the public by maximizing consumer welfare. Particularly in such a dynamic market in which innovation is so greatly needed, government regulators must be careful not to intervene in a manner that will constrain productive market forces.

Thank you for your attention to this matter.

Sincerely,

MIKE LEE
Ranking Member, Subcommittee on
Antitrust, Competition Policy and Consumer
Rights