



U.S. PIRG



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July 29, 2015

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: Investigating CVS Health's acquisition of Omnicare, Inc.

Dear Chairwoman Ramirez:

On behalf of Consumer Federation of America, US PIRG, Consumer Action, and Consumer Watchdog and the millions of American consumers we represent, we urge the Federal Trade Commission to thoroughly investigate the merger of CVS Health and Omnicare, Inc. and issue a second request for further information. We believe this acquisition poses significant risks for the users of long-term care ("LTC") pharmacies, and in particular, the more than two million Part D Medicare beneficiaries that receive LTC while living in skilled nursing facilities throughout the United States. The acquisition also poses a significant risk of increasing costs for vulnerable senior citizens and the disabled, increasing out of pocket costs, and increasing costs for Medicare Part D.

The Commission recognizes it is vital to protect Part D competition and did so in its 2012 enforcement action challenging Omnicare's proposed hostile takeover of the second largest LTC pharmacy, PharMerica. Its complaint fully documented that Omnicare possesses market power, and the LTC pharmacy market is competitively fragile.¹ Omnicare currently has a market share of roughly 47 percent, far larger than its closest rival PharMerica which has a 10 percent market share.² Other firms are much smaller with the third largest LTC pharmacy garnering only a two percent market share.³ Moreover, there exist significant barriers to entry into the LTC pharmacy market and only Omnicare and PharMerica effectively service national nursing home chains.

The FTC complaint documented in detail that Omnicare already exercised its market power extracting supracompetitive reimbursement rates from Part D plans. The FTC found that Omnicare typically "threaten[s] to terminate its participation in the Part D sponsor's LTC Pharmacy network if the sponsor refuses its demand for higher rates" and, in situations in which

¹ Complaint, *In the Matter of Omnicare, Inc.*, F.T.C. Docket No. 9352 (Jan. 27, 2012).

² *Id.* (estimating a combined Omnicare and PharMerica market share of 57 percent); see also Lena Anthony, *Grappling with the long-term care market*, PHARMACEUTICAL COMMERCE (Aug. 30, 2012), <http://goo.gl/EK9FVk>.

³ Complaint, *In the Matter of Omnicare, Inc.*, F.T.C. Docket No. 9352.

the Part D sponsor refused, “ha[d] repeatedly threatened to bring the impasse to CMS’s attention, placing CMS approval of the sponsor’s entire Part D business at risk.” Simply Part D plans had to capitulate.

When reviewing the Omnicare/PharMerica transaction, the Centers for Medicare & Medicaid Services (“CMS”) concluded that the proposed takeover “appears likely to result in higher reimbursement rates. . . and thereby to increase the cost to CMS (and therefore the U.S. government and U.S. taxpayers) as well as any individuals who pay out-of-pocket costs in connection with such services.”⁴

This proposed merger could create the same anticompetitive effects, enhancing Omnicare’s existing market power. CVS Health is a pharmacy powerhouse with over 7,800 pharmacies and 900 retail medical clinics. Through its pharmacy network, CVS Health has become the leading specialty pharmaceutical provider in the United States. CVS Health also owns SilverScript, one of the largest Medicare Part D plans. Most importantly, CVS Health owns CVS Caremark, the nation’s second largest pharmacy benefit manager (“PBM”) and the largest PBM for Part D plans.

CVS has engaged in a wide variety of conduct that raises concerns for consumers. CVS Health – through Caremark, has engaged in restrictive network practices harming consumers for years,⁵ as well as other conduct harmful to consumers.⁶ In particular, “CVS Caremark often uses PBM-related programs to drive plan participants into [its own stores],” consolidates all patients prescriptions at CVS and forces consumers to switch from competing pharmacies to CVS.⁷ CVS is increasingly using restricted networks to force vulnerable specialty consumers to use Caremark’s specialty pharmacy rather than their pharmacy of choice.

If consummated, the transaction creates a number of potentially problematic vertical and horizontal antitrust issues that could lead a decrease in services and higher prices for both payors and consumers. We believe there are two specific areas of concern.

Long-Term Care

By 2050, there will be an estimated 83.7 million elderly Americans, nearly double the current total.⁸ Long-term care, or the treatment and pharmacology of elderly patients with chronic diseases and disabilities, is a critical element in elderly healthcare and is typically performed at skilled nursing facilities or by home health care professionals. With nearly half of the market

⁴ *Id.*

⁵ See Change to Win, *CVS Caremark: An Alarming Merger Two Years Later* (Nov. 2009), <http://goo.gl/Utcgdi>; see also Letter from Sens. Pryor and Wicker to FTC Chairman Leibowitz (July 23, 2009) (reporting “consumer deception and harm through some of CVS/Caremark’s practices have come to our attention.”).

⁶ See, e.g., *Illinois, et al. v. Caremark Rx, L.L.C.*, No. 08-CH-05634 (Circuit Court of Cook County, IL. 14 Feb. 2008) (Caremark paid \$36.7 million to Department of Justice and several states attorneys general to settle charges over deceptive trade practice including drug switching, failing to inform clients that Caremark retained all profits from the unsolicited drug switches, and restocking and reshipping previously dispensed drugs that had been returned to Caremark).

⁷ See Change to Win, *supra* note 5 at 3.

⁸ Jennifer M. Ortamn, Victoria A. Velkoff, & Howard Hogan, *An Aging Nation: The Older Population in the United States*, CENSUS.GOV at 1 (2014), available at <https://goo.gl/OSXPxx>.

share in LTC pharmacy services, Omnicare is the dominant pharmaceutical supplier for LTC patients.⁹

By acquiring Omnicare's LTC pharmacies, CVS Health will become a completely vertically integrated entity in the long-term care market—CVS Health will control a Part D Plan, a dominant PBM, and LTC pharmacies. As such, CVS Health and particularly Caremark, the largest PBM for Part D plans, will no longer be a neutral gatekeeper for long term care pharmacies. Instead, CVS Caremark, and Part D Plan, SilverScript, will utilize Omnicare as the long-term pharmacy of choice, forcing patients to utilize Omnicare's services. CVS has adopted this policy in other markets, restricting retail and specialty alternatives, forcing consumers to use only CVS mail order or CVS retail pharmacies.¹⁰ As a recent New York Times article documents, that restricted choice harms patient care.¹¹

Caremark will adopt a similar strategy to LTC if this acquisition is permitted. As a result, other LTC pharmacies seeking a contract with Caremark may be denied access to the network or only offered significantly lower rates than Omnicare. This could have a direct effect of driving a number of smaller LTC pharmacies out of business or diminishing their ability to compete. Moreover, with CVS Health's backing, Omnicare could also utilize its dominant position as a must-have LTC pharmacy to request higher rates and potentially other favorable stipulations from other Part D Plans.

The restricted networks will increase Omnicare's dominance and it will be in even a stronger position to extract supracompetitive reimbursement rates. Moreover, service will suffer because of the lack of alternatives. The result of the transaction would be similar to Omnicare/PharMerica – higher costs and less access for patients and higher costs for taxpayers.

Moreover, Caremark has access to a tremendous amount of competitively sensitive information about other LTC pharmacies and Part D plans. They are aware of other LTC pharmacies bid history and reimbursement rates. With this information, an integrated CVS Health/Omnicare will not have to bid as aggressively to secure Part D contracts.

Specialty Pharmacy

Specialty pharmaceutical spending, the fastest growing segment of pharmaceuticals involving medications to treat rare and complex diseases such as cancer and hemophilia, is expected to balloon from \$55 billion in 2005 to \$1.7 trillion in 2030.¹² Currently, CVS Health is the dominant supplier of specialty pharmaceuticals with a 26 percent market share.¹³ Omnicare, also

⁹ Anthony, *supra* note 2.

¹⁰ Consumer groups have objected to these restricted networks. *See, e.g.* Amicus Brief of Consumer Federation of America, US PIRG and the National Legislative Association on Prescription Drug Prices, *Muecke Co., Inc. et al v. CVS Caremark Corp. et al*, No. 10-cv-00078 (S.D. Tx. 2011).

¹¹ *See* Katie Thomas and Andrew Pollack, *Specialty Pharmacies Proliferate, Along With Questions*, N.Y. TIMES (July 15, 2015), <http://goo.gl/OCwOhT>.

¹² *Overview of the Specialty Drug Trend: Succeeding In The Rapidly Changing U.S. Specialty Market*, IMS HEALTH at 2 (2014), available at <https://goo.gl/E93ejy>.

¹³ *The Top 10 Specialty Pharmacies of 2014*, DRUG CHANNELS (Mar. 12, 2015), <http://goo.gl/zGZYzC>.

one of the top ten largest specialty pharmacy suppliers,¹⁴ has a growing interest in specialty services, increasing its revenue in specialty pharmacy services by 20 percent in 2014.¹⁵ A combined CVS Health/Omnicare would further cement CVS Health's dominance within the highly lucrative specialty market likely leading to increased costs for patients.

Moreover, with CVS Health's dominant position in the specialty market, as well as its position as a leading PBM, more patients could be forced to utilize CVS Health's specialty pharmacies instead of their chain or independent specialty pharmacy of choice.¹⁶ This will lead to higher prices and reduced service.

Conclusion

This proposed acquisition raises profound concerns for the millions of elderly and disabled beneficiaries who rely on Part D. Omnicare has already engaged in conduct that harms beneficiaries and taxpayers in higher costs. This merger will enhance that power and should be carefully scrutinized by the FTC. We believe these issues, especially because of the impact on the vital Part D program, require the Commission to conduct a thorough investigation and issue a second request.

We would be glad to meet with you to discuss the matter at any time.

Sincerely,

Rachel Weintraub, Legislative Director and General Counsel, Consumer Federation of America
Jesse Ellis O'Brien, Healthcare Advocate, US PIRG
Ken McEldowney, Executive Director, Consumer Action
John Simpson, Consumer Advocate, Consumer Watchdog

Cc: Commissioner Julie Brill
Commissioner Maureen K. Ohlhausen
Commissioner Joshua D. Wright
Commissioner Terrell McSweeney
Deborah L. Feinstein, Director, FTC Bureau of Competition

¹⁴ *Id.*

¹⁵ Trefis Team, *How Will CVS Health Benefit From its Acquisition of Omnicare?*, FORBES.COM (June 1, 2015 3:05 PM), <http://goo.gl/eorKvm>.

¹⁶ See Katie Thomas and Andrew Pollack, *supra*, note 11.