

**Testimony on
The Proposed Merger Between Express Scripts and Medco**

By

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**To
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Intellectual Property, Competition, and the Internet**

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Thank you for inviting me to speak today. I am counsel to the law firm of Manatt, Phelps & Phillips. I was formerly a Regional Director of the Federal Trade Commission (FTC), and have written a textbook on that agency. I have forty years of antitrust background as a litigator, have served as head of litigation for a large health insurer as well as general counsel of a health plan trade association, and teach a course in health care competition at George Washington University graduate school.

I would like to note that while my firm is an outside counsel, as am I, for the trade association of pharmaceutical benefit managers (PBMs), and occasionally provides legal services for Medco Health Solutions, neither the firm nor I represent Express Scripts or Medco in regard to this proposed merger. Nor have I spoken to or consulted with any of the companies' personnel or their attorneys, or with any of the government personnel involved in the evaluation of the proposed merger in connection with the proposed transaction.

As a result, I am acting here as a witness at the invitation of the Committee, am not appearing on behalf of any party, and have purposefully avoided gaining specifics of the proposed merger except through public sources. My testimony outlines generally what the FTC has found in its extensive recent analyses of the competitiveness of the PBM industry, as well as my sense of how the agency is likely to view this proposed merger based on its previous rulings and studies.

More specifically, this testimony outlines:

- (1) The role of the FTC in preventing unfair methods of competition.**
- (2) The FTC's extensive analyses of the nature of the PBM industry, including its multiple findings that the market is highly competitive.**
- (3) How the FTC has characterized the functions of the PBM industry and the characteristics of its participants, customers and contractual partners.**
- (4) How the agency could be expected to evaluate the proposed merger to determine if it "substantially lessens competition."**
- (5) The precedent of the FTC's opinion finding no anticompetitive effects of the 2004 AdvancePCS/Caremark merger, and how the agency evaluates merger efficiencies.**

I. Introduction: The FTC's Role in Ensuring Competitiveness in Health Care Markets:

Health care markets have always been a high priority for the Commission. The agency's goal has been to ensure that these markets operate competitively, and its reports, advocacy letters, and investigations aim to carry out the mandate Congress gave it almost

a hundred years ago, in 1914: to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.¹

The FTC's role, in a nutshell, is to protect the market from anticompetitive conduct that prevents it from responding freely to the demands of consumers. That is the key to antitrust law initiatives—determining the impact on consumers, in terms of possible higher prices and reduction in quality and choices. As former chair Timothy Muris of the FTC has succinctly stated, “Aggressive competition promotes lower prices, higher quality, greater innovation, and enhanced access.”² The FTC and its sister enforcement agency, the Department of Justice (DOJ), step in when they view private markets as operating improperly, such as when competitors collude on prices, or divide customers and markets, or when monopolists charge higher than competitive prices for goods or services. Indeed, the Agencies have collaborated in issuing reports such as the massive 2004 Healthcare Report examining the role of health care competition in addressing the cost and quality challenges facing our health care system.³

The result of what Prof. Muris calls “aggressive competition,” however, may not always be desirable for the particular competitors involved.⁴ That's because competition law focuses on protecting competition and the competitive process, rather than individual competitors.⁵ Indeed, in their 2004 Report the enforcement agencies pointed out that while “competition can be ruthless,” in the long run the fact that it “creates winners and losers can inspire health care providers to do a better job for consumers.”⁶

Most pertinent here today is the FTC's merger work, including its issuance last year in conjunction with the DOJ of new revised Horizontal Merger Guidelines for the first time in more than 18 years. Those Guidelines, discussed below, provide what the FTC calls “more transparency so that businesses and their counsel may better understand the merger review process.”⁷ The FTC uses the principles in those Guidelines to review a wide variety of mergers in the health care arena, not just PBM mergers, but also drug company mergers, as well as mergers involving hospitals, insurers, and ancillary services like dialysis clinics.

II. The FTC's Extensive Analyses of PBMs:

The proposed merger the Committee is focused on today involves pharmacy benefit managers, or PBMs, and the FTC considers itself as an expert in the area -- and rightfully

¹ FTC Act, 15 U.S.C. § 45.

² Timothy J. Muris, “Everything Old is New Again: Health Care and Competition in the 21st Century,” Competition in Health Care Forum, Nov. 7, 2002, at 6.

³ FTC and DOJ, “Improving Health Care: A Dose of Competition” (2004) (hereafter “FTC/DOJ Report”)

⁴ Sage, W., Hyman, D., and Greenberg, W., “Why Competition Law Matters to Health Care Quality,” 22 Health Affairs No. 2 at 31. (March/April 2003).

⁵ See *Brown Shoe v. United States*, 370 U.S. 294, 320 (1962) (Clayton Act illustrates “congressional concern with the protection of competition, not competitors, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition.”)

⁶ FTC/DOJ Report, Executive Summary, at 4.

⁷ *Id.* at Sec. 1.

so. It has been extensively involved in reports and advocacy letters regarding PBMs, including:

- Its ground-breaking report on health care competition issued in 2004 (in conjunction with the DOJ) contains an extensive discussion of why the growth of PBMs constitutes “an important development in providing consumer access to prescription drugs.”⁸ The report devotes an entire chapter to how PBMs operate, and covers such topics as drug formularies, payment terms, industry overview, as well as data on PBM cost savings.⁹
- Its 2005 comprehensive “Conflict of Interest” PBM Study, written at the behest of Congress under the 2003 legislation that instituted the Medicare prescription drug program, which examined possible conflicts of interest that might arise when PBMs owned mail-order pharmacies. The Commission obtained extensive data, including agreements between PBMs and their plan sponsors as well as between PBMs and pharmaceutical manufacturers. The PBM Study found strong evidence that such ownership of mail order pharmacies generally did not disadvantage plan sponsors and that competition in the industry afforded health benefit plans sufficient tools with which to safeguard their interests.
- Multiple advocacy letters, where the FTC comments on the anticompetitive implications for consumers of proposed state legislation that interferes with PBMs’ flexibility to work with their customers to design drug benefits that lower costs and expand access. For one example, it recently recommended against enactment of a New York bill that would limit a health plan’s ability to steer beneficiaries to a lower cost mail order vendor of drugs.¹⁰ For another example, it has been in the forefront in opposing state attempts to pass so-called “transparency” statutes (which mandate exhaustive disclosures of proprietary information to PBM clients) as counterproductive, because (1) PBM customers do not need the mandated information to make purchasing decisions, and (2) having that information publically available furthers possible tacit collusion among pharmaceutical manufacturers with which PBMs must bargain for lower drug prices.

The Commission’s general concern in all these studies and reports, again, is how well the market is working competitively for consumers to keep drug prices low. The FTC has repeatedly cautioned against enacting legislation resulting in higher prices for PBM

⁸ “Improving Health Care,” ch. 7 at 9. See Kanwit, S, “FTC ‘Conflict of Interest Report’: Implications for the Competitive Marketplace in Prescription Drugs,” American Bar Ass’n *Antitrust Bulletin* (2005).

⁹ There is extensive literature on PBM cost savings, including from the U.S. General Accountability Office (PBMs produced savings for health plans participating in FEHBP from retail pharmacies averaging about 18% lower than cash customers paid): “Effects of Using Pharmacy Benefit Managers on Health Plans, Enrollees, and Pharmacies,” Jan. 2003.

¹⁰ FTC Letter to Hon. James L. Seward, New York, Aug. 8, 2011.

services and pharmaceuticals that can “undermine the ability of some consumers to obtain the pharmaceuticals and health insurance they need at a price they can afford.”¹¹

III. How The FTC Will Look at the PBM Market:

The FTC will view the potential merger at issue here against the backdrop of this extensive history of analyzing the PBM marketplace, and hence some of its previous analyses and findings are instructive here in terms of (1) what the industry does, and (2) how competitive the industry is.

What PBMs do: More than 215 million Americans (nearly 90% of all of those with prescription drug coverage) get their benefits through PBMs, according to the research firm Visante. Those benefits can be provided through Federal programs (like Medicare, Medicaid, and the Federal Employees Health Benefits Program, or FEHBP), and also through the commercial market. The functions PBMs perform are many-faceted, as they interface both “up” and “down” with all the myriad entities in the drug distribution chain. In the words of the FTC, PBMs do the following:

- they interface with their clients, namely the health plans, private and public employers, insurers, unions and other entities that provide prescription drug benefits to their employees or members;
- they interface with retail pharmacies as they assemble networks to allow consumers to fill prescriptions at many locations;
- they may set up mail-order operations for health plan enrollees, often for maintenance medications;
- they interface with pharmaceutical manufacturers as they negotiate pricing, including preferred placement rebates and administration fees.¹²

In addition, PBMs often provide “quality-related” services to their customers, including the following, again in the FTC’s words:

- they provide drug utilization reviews that include analysis of physician prescribing patterns to identify physicians prescribing high cost drugs when lower cost, therapeutically equivalent alternatives are available.
- they provide disease management services by offering treatment information to and monitoring of patients with certain chronic diseases.¹³

How competitive the market is: The FTC has consistently found that the PBM industry is *vigorously competitive*, in that multiple PBMs compete for contracts with plan sponsors.¹⁴ The agency’s 2005 PBM Study estimated that about 40-50 PBMs operate in

¹¹ Letter to Assembly member Greg Aghazarian, California, Sept. 2, 2004, at 9; *see also* letter to Rep. Patrick T. McHenry, North Carolina, July 15, 2004; letter to Delegate Terry Kilgore, Virginia House of Delegates, Oct. 2, 2006.

¹² FTC PBM Study, Executive Summary, at i through vi.

¹³ FTC Letter to Terry Kilgore, VA House of Delegates, Oct. 2, 2006 at 4.

¹⁴ FTC Statement, *In the Matter of Caremark Rx, Inc./AdvancePCS*, at 6.

the country.¹⁵ Another source, Atlantic Information Services, indicates that today that number has risen to nearly 60 PBMs in the marketplace.¹⁶

No single PBM or PBM model dominates the marketplace. The Commission's former Chairman in the agency's FTC Study specifically noted "the variety of PBM services" available to PBM customers, including the wide variations in ownership structure.¹⁷ Some PBMs are stand-alone independent PBMs (like Express Scripts), some are affiliated with health insurers or health plans (like Aetna, CIGNA, and Kaiser), and some consist of buying groups of independent pharmacies, such as EPIC. CVS Caremark is a combination of a PBM and a retail drug chain. Until recently, in fact, the large drug retailer Walgreens owned a PBM business, which it sold to another PBM.

PBMs also vary greatly when it comes to the market they specialize in – e.g., larger vs. smaller employers, or regional vs. national markets. Significantly, although some PBMs operate only locally or regionally, the FTC in the past has found them capable of competing with the big national PBMs.¹⁸ Moreover, while some PBMs operate their own mail order facilities, others contract that service out. Some PBMs participate in the Federal Medicare prescription drug program known as Part D as PDPs, including the two companies at issue here, while some do not.

To add more heterogeneity to the competitors operating in the market, only some PBMs manage the important and fast-growing category of specialty drugs, i.e., those used to treat serious and chronic conditions like cancer, multiple sclerosis, hemophilia, and rheumatoid arthritis; the drugs in this category are not only costly (tens of thousands or even hundreds of thousands of dollars a year) but often require special handling and administration.¹⁹ Competing with PBMs in this market segment are entities such as health plans and stand-alone specialty providers.

IV. How Will the FTC Determine if the Proposed Merger Will “Substantially Lessen Competition”?

Under the Federal premerger notification program established by the Hart-Scott-Rodino Act, larger mergers are subject to the regulatory approval process run by the FTC as well as the DOJ.

The starting point in determining how the FTC is likely to look at this (or other) proposed mergers is the antitrust agencies' new joint Horizontal Merger Guidelines, released in April, 2010.²⁰ The Guidelines emphasize that they are just that –guides –to assist the

¹⁵ FTC PBM Study, Exec. Summary, at v.

¹⁶ Atlantic Information Services, "2000-2009 Survey Results: Pharmacy Benefit Trends and Data," 2009.

¹⁷ FTC PBM Study, Press Statement of Chairman Deborah Platt Majoras, Sept. 6, 2006.

¹⁸ FTC Letter to Rep. Patrick McHenry, regarding No. Carolina HB 1374 (July 15, 2005), at 8.

¹⁹ "Slowing the Impact: The Role of Specialty Pharmacy in Managing Progressive and Chronic Diseases," UnitedHealth Group White Paper, April 2011.

²⁰ Horizontal Merger Guidelines, released April 20, 2010, replacing the Guidelines issues in 1992, revised in 1997. The FTC's Bureau of Competition has also issued a Statement on Negotiating Merger Remedies, at www.ftc.gov/bc/bestpractices030401.shtm.

analytical process. Their goal is to help answer the key question: *will the merger substantially lessen competition?* That accords with the underlying statute, Section 7 of the Clayton Act, which condemns mergers and acquisitions where the effect “may be substantially to lessen competition, or to tend to create a monopoly.”²¹ The Clayton Act is enforced by both the DOJ and FTC.

The Guidelines note that the Agencies wisely attempt “to identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral.” How is that determination made? The process is always steered by the facts particular to a given merger. Like antitrust law in general, merger analysis is (in the words of the Guidelines) “a fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns...”

The most important theme of the Guidelines is that “mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise.” Reams have been written about what constitutes “market power,” but the definition in the Guidelines is relatively straightforward: “*A merger enhances market power if it is likely to encourage one or more firms to raise prices, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.*”

While the Guidelines generally cover merger analysis in terms of impact on pricing, they caution that enhanced market power “can also be manifested in non-price terms and conditions that adversely affect customers...” So the Agencies would look at a proposed merger through the prism of whether it would be likely to (for example) reduce the quality of the product, or the variety of product available, or reduce product quality, or diminish innovation – all key to assessing competitive impact.

What sources of evidence does the FTC look at? The Guidelines note that information can come from (1) the merging parties in the form of documents, testimony, or data “describing industry conditions,” (2) customers, who can be asked about the likely impact of the merger, and (3) other industry participants and observers, such as suppliers, analysts, and rival firms in the market. All perspectives are considered, whether evidence that the “merger is likely to result in efficiencies” will be reviewed, as well as any evidence of possible anticompetitive results, such as “that the merging parties intend to raise prices, reduce output or capacity, reduce product quality or variety...”²²

What kinds of evidence is the FTC assessing? Broadly, “any reasonably available and reliable evidence” may be reviewed to see if a merger “may substantially lessen competition.” For example, the Guidelines call for looking at evidence regarding “direct comparisons based on experience,” i.e., the *economic history and structure* of the PBM industry, such as “recent mergers, entry, expansion, or exits in the relevant market.”

²¹ 15 U.S.C. § 18.

²² 2010 Guidelines at 4.

²³ The second type of evidence would include “the merging parties’ market shares in a relevant markets, the level of concentration, and the change caused by the merger.” In addition, the Guidelines note that the Agencies will consider “whether the merging firms have been, or likely will become absent the merger, substantial head-to-head competitors.”

Applying the Merger Guidelines to PBMs:

Market share analysis generally:

When sellers exercise market power, it is called “monopoly,” and when buyers exercise it, it is called “monopsony.” Both decrease consumer welfare. PBMs can be viewed in a broad sense as both buyers (of services and discounts from retail pharmacies to be included in a plan’s pharmacy network, for example) as well as sellers (of administrative services to health plans and their other customers). That dual role makes the analysis more complicated, but the same principles apply to both.

Media accounts of mergers or proposed mergers often focus on the concept of “market share,” implying that this measure is a certain way to determine anticompetitive effects. What the antitrust agencies care about is *market power: do sellers (or buyers) in the market have the ability to profitably maintain prices above (or below) competitive levels for a significant period of time?* Measuring market power is a fact-intensive job. Absent *direct evidence* of anticompetitive effects (higher prices, lower outputs, and lower quality), the analysis begins with (1) identification of the relevant product and geographic markets, and then (2) calculation of the shares of the market participants and the concentration ratios. To identify concentration levels that might require further regulatory scrutiny, the antitrust agencies traditionally use the Herfindahl-Hirschman Index (HHI), calculated as the sum of squared market shares.²⁴ The antitrust agencies consider both the post-merger level, as well as the increase resulting from the merger, and regard a market in which the HHI is below 1500 as unconcentrated, while above 2500 is deemed highly concentrated.

But it is a mistake to place too much weight on market concentration in a highly fluid market like PBMs, where market shares are not “stable over time” (in the words of the Guidelines.)²⁵ As the Agencies note, “even a highly concentrated market can be very competitive if market shares fluctuate substantially over short periods of time in response to changes in competitive offerings.” Conclusions regarding “concentration” depend enormously on how market is defined, whether broadly or narrowly. In addition, once the particular market is determined the real issue becomes whether the firm has obtained or maintained that power through improper means.

Applying the Market Share Analysis to PBMs:

It is likely that the FTC will find the PBM market to be unconcentrated, assuming it regards the product market as the national provision of pharmacy benefit manager

²³ 2010 Guidelines at 3.

²⁴ 2010 Merger Guidelines at 18.

²⁵ 2010 Merger Guidelines at 18.

services. As outlined below, (1) no single PBM's market share exceeds 12% based on 2009 data, and customers have multiple choices; (2) the market is dynamic, meaning that there are multiple entries and exits of market participants; and (3) it appears that the market has become more competitive and more heterogeneous over time.

To analyze competitive effects, the agency, in accord with classic merger analysis, will first likely define the various markets in which PBMs operate (e.g., small vs. large employer, government customers vs. commercial business, mail-order vs. non-mail order, among others) and analyze those customers' "ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service."²⁶

While it is difficult to know definitively what market (or markets) the FTC will choose to evaluate here, it may be multiple markets. In a past (1999) evaluation involving a PBM, it found the market to be "the provision of [PBM] services by national full-service PBM firms."²⁷ Because both the merging parties operate nationally, that is likely to be designed as the geographic market. But in terms of product market, the FTC may decide to look not just at the commercial market as a whole, but also at the merging parties' shares of retail scripts vs. mail scripts; or shares of the Medicare Part D market, where numerous PDPs including UnitedHealth Group, CVS Caremark, Humana, Coventry, CIGNA and others compete.²⁸ Then the FTC must judge if the large employer market is separate from the small employer market, and if so, what the impact on those customers might be if the parties merged.

There are numerous sources of respected data for the FTC to peruse regarding PBM market share, and it is likely the FTC will look at both (1) the number of covered lives (i.e., members) each company has, as well as (2) the total annual prescription volume of each PBM. Using either measure, Atlantic Information Services (AIS) reports that no single PBM dominates the market: under the "covered lives" measure, the largest PBM in 2009 (CVS Caremark) had an 11.85% market share, while Medco Health Solutions was assigned a 8.67% and Express Scripts a 7.95% share.²⁹ Thus, no individual PBM's share exceeded 12% during that time period.

That 2009 data, however, must be tweaked in light of the fluidity of the PBM marketplace. Players (and their market shares) have changed since then, and are likely to continue to morph, a fact that the FTC will undoubtedly take notice of. The FTC and its economists in the Bureau of Economics will have up-to-the-minute data presenting a complete picture of that market in all its complexity. For an important example, the 2009 AIS data cited above will soon be outdated as to Medco, since UnitedHealth announced this summer that it will take back the PBM business it outsourced to Medco at

²⁶ 2010 Guidelines at 7.

²⁷ *Merck & Co., Inc.*, 127 F.T.C. 156 (1999). That case involved the acquisition by a pharmaceutical manufacturer of a PBM.

²⁸ Note that Express Scripts partners with health plans in the Part D program, while Medco is a PDP itself, and has a broad portfolio of Part D products.

²⁹ Atlantic Information Services, Inc., 2000-2009 Survey Results, Pharmacy Benefit Trends & Data: Costs, Benefit Design, Utilization and PBM Market Share, at 53.

the end of the year for its own PBM, OptumRx. Two more examples: the AIS 2009 survey lists Walgreens-OptionCare as having 10.85% of the PBM market, but Walgreens has since sold that business,³⁰ and it also lists WellPoint's NextRx as having 5.07% of the market, but WellPoint sold that business in the second half of 2009.

The possibility of new entrants is also critical: whether it is relatively easy to enter into the market and compete with the merged entity is also a factor for the FTC.³¹ Again demonstrating the fluidity of the market, the large retailer Wal-Mart has recently entered the PBM space, and introduced a preferred network model that includes 400 employers and 20 PBMs and managed care organizations; it also has a Part D network in conjunction with the health insurer Humana.³² Moreover, "Drug Benefit News" and other industry sources report continually on new initiatives and novel business models undertaken by large PBMs as well as small PBMs, some affiliated with health plans and some stand-alone, as well as retail pharmacies.

Impact of a merger on PBM customers:

The Merger Guidelines stress that what counts in assessing a proposed merger is whether customers have alternatives both in terms of price and/or quality.³³ The FTC will look at the impact on both (1) PBM clients, which include the health plans, private and public employers, insurers, unions, and (2) the ultimate consumers of those drugs, who will ultimately benefit if the merger brings efficiencies to the marketplace.

It is likely, given what the FTC has previously found to be the competitive nature of the market, that customers will have sufficient alternatives to which they can turn should they find that the merger has resulted in a price increase or a reduction in quality of service. Plan sponsors can and regularly do change PBMs if they are dissatisfied with performance and/or pricing.³⁴ The FTC has found that PBM customers are sophisticated purchasers, who often submit Requests for Proposal (RFPs) to suppliers of PBM services to assure they have options and an objective assessment of multiple alternatives. Often clients rely on expert consultants to assist them throughout the RFP process to assure their needs are met and their interests are protected, including agreed-upon pricing based on the customer's unique requirements, plan designs to encourage plan enrollees to use more affordable medications, specific performance guarantees, and extensive audit rights. Moreover, most PBM contracts are only for relatively short periods (one, two or three years is common) so that plan sponsors have the opportunity to switch PBMs if they are dissatisfied with performance or pricing.

³⁰ Walgreens sold its PBM business to Catalyst Health Systems, and WellPoint sold its PBM to Express Scripts.

³¹ "A merger is not likely to enhance market power if entry into the market is so easy that the merged firm and its remaining rivals...could not profitably raise prices or otherwise reduce competition..." 2010 Guidelines at 27.

³² AISHealth.com, "Drug Benefit News," Sept. 9, 2011.

³³ Id.

³⁴ For example, CalPERS (the California Public Employees' Retirement System) announced in May, 2011 that it would not renew its contract with Medco beyond 2011.

As a result of the RFP process, the PBM customer can almost always leverage its negotiating ability and have multiple PBMs competing for its business. Sometimes those customers increase competition among PBMs by bidding out separate aspects of PBM services (such as claims processing or network access), instead of retaining a single PBM to provide a comprehensive group of services. Moreover, critically for competitive purposes, these PBMs have to compete for the business on non-price dimensions as well, including benefit design, the extent of the retail network, and the quality of mail-order service.

The FTC has historically been very confident of plan sponsors' ability to negotiate flexible yet transparent contracts with PBMs that suit the customers' particular needs. As the FTC noted in its PBM Conflict of Interest study, "health plans already are able to negotiate contract terms –including diverse disclosure and audit rights – that protect them from conflicts of interest." The agency has emphasized the wide range of pricing models available to customers in PBM contracts.³⁵

V. Evaluating a PBM Merger for Possible Efficiencies: The 2004 Caremark/AdvancePCS Example:

In 2004, the FTC investigated a proposed merger of two large PBMs and found there was not likely to be anticompetitive impact either for plan sponsors or for retail pharmacies. In fact, the merger was found likely to generate *efficiencies* that helped the merged entity's ability to compete and might result in lower drug prices for consumers.

The then-proposed acquisition of AdvancePCS by Caremark Rx., Inc. involved (in the FTC's words) "two of the largest providers of prescription benefit management services in the United States." After analysis, it found the following:

- No anticompetitive impact for either small or large employer customers, because they could turn to other alternatives. The FTC concluded that (a) "dozens of small, often regionally-oriented PBMs provide sufficient service offering to smaller employers (and will continue to do so post-acquisition)," and (b) "large employers are not likely to encounter anticompetitive effects" given adequate competition from full-service PBMs with national scope as well as "significant additional competition from several health plans and several retail pharmacy chains offering PBM services..."³⁶
- No anticompetitive impact on retail pharmacies: Focusing on the merged entity's future negotiation of dispensing fees with retail pharmacies, the FTC concluded that the impact was not likely to be anticompetitive. While those dispensing fees might be reduced as a result of the increased bargaining power of the merged PBM, such increased bargaining power can be "procompetitive when it allows the buyer to reduce its costs and decrease prices to its customers."

³⁵ FTC Letter to Hon. James L. Seward, N.Y. Senate, March 31, 2009; FTC PBM Study at 57-58.

³⁶ Statement of the Federal Trade Comm. "In the Matter of Caremark Rx, Inc./AdvancePCS File No. 031 0239" at 2, available at <http://www.ftc.gov/os/caselist/0310239/040211ftcstatement310239.pdf>.

This second finding in the *AdvancePCS* investigation is important here, because the FTC addressed the fact that PBMs in effect wear “two hats” in the prescription drug marketplace. Viewed vis-à-vis retail pharmacies, PBMs are “buyers” of their services. What the FTC found is that it is procompetitive if a PBM merger results simply in a shift in purchases from an existing source “to a lower-cost, more efficient source,” rather than a reduction in purchases.³⁷ And who are the ultimate beneficiaries? The consumers of prescription drugs, since the agency found it “likely that some of the PBM’s increased shares would be passed through to PBM clients,” given the highly competitive nature of the industry.

Thus when PBMs contract with retail pharmacies, it does not constitute an indicia of anticompetitive behavior if a merger results in lower payments to pharmacies. As the FTC commented: “Nor do competition and consumers suffer when the increased bargaining power of large buyers allows them to obtain lower input prices without decreasing overall input purchases.”³⁸ The *AdvancePCS* merger analysis highlights a second important point: as noted in the Merger Guidelines, mergers can bring about efficiencies and enhance the merged firm’s ability and incentive to compete. The result may be “lower prices, improved quality, enhanced service, or new products.”³⁹

While the Guidelines caution that these types of efficiency claims cannot be “vague” or “speculative,” it is likely that the Agency will find efficiencies here, when the merger is viewed in light of the following:

- the demand in the marketplace for PBM services,
- the highly competitive nature of marketplace, and
- the record of PBMs in driving down prescription drug prices.

The evidence on the last point, the record of PBMs in driving down drug prices, is impressive. Prescription drug spending (according to government figures) grew only 3.5% in 2010, down from 5.3% in 2009.⁴⁰ Much of the credit for that goes to PBMs as well as their customers, who are seeking to control total health care costs, and adopting measures such as promoting the cost-savings of generic medications as well as other options such as larger copayment spreads and narrower pharmacy networks.⁴¹

VI. Conclusion

The mission of the Federal Trade Commission in evaluating this proposed merger is to decide if the merger will be competitively harmful while at the same time “avoiding

³⁷ FTC Statement at 2, emphasis in original.

³⁸ FTC Statement at 2.

³⁹ 2010 Guidelines at 29.

⁴⁰ Keehan, S. et al., “National Health Spending Projections Through 2020,” 30:8 *Health Affairs* (Aug. 2011), citing figures from CMS’s Office of the Actuary.

⁴¹ “Step therapy, generics, smart technology are among top 2012 benefit design tactics,” “Drug Benefit News,” Aug. 15, 2011.

unnecessary interference with mergers that are either competitively beneficial or neutral.”⁴² The FTC is uniquely qualified to perform that evaluation –and in a relatively short time – given its past extensive studies and reports on the PBM marketplace.

Thank you for the opportunity to testify, and I am available to answer any questions on my statement.

⁴² 2010 Guidelines at 1.