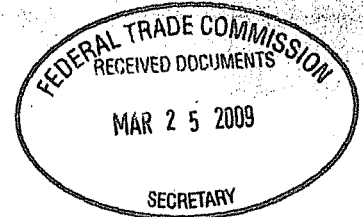




March 18, 2009

Federal Trade Commission
Office of the Secretary
Room H-135
600 Pennsylvania Ave. N.W.
Washington, D.C. 20580



Re: *Comments regarding Proposed Consent Order In the Matter of CVS Caremark Corporation, FTC File No. 072 3119*

Dear Secretary:

The National Community Pharmacists Association, which represents the interests of over 25,000 community pharmacies, submits these comments regarding the Proposed Consent Order *In the Matter of CVS Caremark Corporation, FTC File No. 072 3119*. We welcome the FTC's enforcement action against CVS Caremark, but are very concerned that the actions does not go far enough in protecting patient privacy, especially the misuse of data by Caremark in order to benefit its parent corporation CVS, and harm competition.

The settlement – which was secured simultaneously by the FTC and the HHS following media reports of CVS pharmacy locations around the country dumping sensitive records into publicly accessible dumpsters – proposes several measures on CVS Caremark to correct its failure to protect patient privacy. The FTC found incidents of the failure to protect information in 15 cities across the United States. To remedy these violations the FTC consent order requires CVS Caremark to establish, implement and maintain a comprehensive information security program to protect personal information collected from consumers and employees. It also requires the company to obtain a third-party audit every two years for the next 20 years to ensure compliance and submit to standard record-keeping and reporting provisions for FTC compliance monitoring. Finally, the FTC order bars future misrepresentations of CVS security practices. In addition, the HHS resolution agreement requires CVS Caremark to pay a \$2.25 million settlement and implement a corrective action plan for its privacy policies, information disposal, and employee compliance.

We believe the FTC and HHS enforcement action against CVS Caremark was timely and appropriate. CVS Caremark is the country's largest retail pharmacy chain with over 6,900 stores, and also the country's second largest pharmacy benefits management company (PBM), Caremark. By its own estimates, CVS has "more

information on the consumer and their behavior than anyone else," and possesses data on 30 percent of all prescriptions in the U.S. – over 1.2 billion prescriptions per year. In many respects it possesses more personally sensitive health care information than any other private entity in the country.

Policing CVS' use of personal health care information is a critical priority. Yet in the past CVS has not lived up to the minimal standards of protecting private health care information. As detailed in a comprehensive report by Change to Win and numerous press reports, for the past several years CVS Caremark has violated consumer and patient privacy in a wide variety of fashions including the egregious improper disposal by dumping private information in publicly accessible trash containers. Moreover, despite these public reports of breaches of these straightforward obligations to protect consumers' sensitive private healthcare information, CVS has failed to reform its sub-par practices. In fact, this case was preceded by earlier actions by the Attorneys Generals of Texas and Indiana.

We represent thousands of small business persons who diligently abide with the privacy regulations on a daily basis. If those small business owners, managers, and employees can follow the standards of the law, why can't CVS?

We commend the Federal Trade Commission for investigating and taking action on this important issue. However, the history of the investigation raises serious issues of whether CVS will comply with the Commission's order. Unlike most respondents in a government investigation, CVS fought aggressively against the staff's request to secure the basic information needed for its investigation. Only after a lengthy battle over the staff's request for information, including a Motion to Quash that delayed the investigation for almost 6 months, did the Commission order CVS to comply with its request. If CVS is unwilling to comply with a simple request for documents what assurance can there be that it will comply with the order?

In addition, we have serious concerns that CVS is using confidential private information about consumers secured from Caremark to attempt to drive consumers to CVS stores. These concerns were detailed in NCPA's December 27, 2008 letter to FTC Chairman William Kovacic (Exhibit A). Numerous pharmacies and consumers have reported that CVS has acquired personal information from Caremark and has used this information in an effort to have the consumers move their prescriptions to CVS.

We believe these actions are violations of the firewall commitment CVS has made to consumers and other pharmacies. CVS made numerous representations to the FTC in its June 20, 2008 Petition to Quash or Limit the Investigation stating that a comprehensive firewall exists between CVS Caremark's retail segment and its PBM segment. Indeed, CVS claims in the attached portion of this petition (Exhibit B) that CVS and Caremark's information systems are completely discrete (please see especially a statement on page three claiming "there is no connectivity between the Caremark and CVS systems that could allow the sharing of personal health information between the

systems?). Evidence collected from numerous consumers and pharmacies across the country suggests that the firewall may have been violated.

Not surprisingly, the focus of CVS's Motion to Quash was keeping documents on the CVS Caremark relationship and Caremark's compliance with its privacy obligations out of the hands of federal regulators. The company campaigned vigorously to have the investigation limited to its retail segment based on claims that Caremark's business practices were irrelevant, outside the FTC's jurisdiction, and outside the scope of the investigation. The FTC appropriately rejected the petition.

Given these facts, the FTC should continue its privacy investigation of CVS with a focus on Caremark's compliance with its ostensible firewall and other privacy obligations. If violations are found further enforcement action is necessary.


In addition, to strengthen the order we recommend that:

- The order should clearly extend to Caremark and the third-party assessments should include an independent audit of Caremark's compliance.
- CVS/Caremark should be required to provide semi-annual third-party assessments of its compliance with the order. The proposed order requires only a biennial report. That is simply inadequate for a company that has committed – and continues to commit – such egregious violations. A biennial report would potentially permit violations to occur and go uncorrected for an extended period of time. Any violations must be corrected promptly and that is why a semi-annual report is necessary.
- CVS/Caremark should be required to report any violations of the order within 30 days of the occurrence of the violation
- CVS/Caremark should be required to notify the affected consumers of any violations of the order. Individuals who are harmed by CVS' failure to abide by privacy regulations or the order should be made aware that their privacy rights have been violated. These individuals should also be informed of their rights under state and federal privacy statutes, so they can take appropriate legal action.
- All of the reports of violations should be shared with the respective State Attorneys Generals for appropriate action. Under the current order, it is unclear whether State Attorneys Generals will be informed of privacy violations. The order should be amended so that this information is shared with the state enforcers.

The FTC has appropriately brought this enforcement action against CVS, and this action will hopefully lead to the correction of truly egregious practices. However, the proposed order should be strengthened to make sure these practices are fully corrected. In addition, the FTC should conduct a separate investigation of potential privacy violations by Caremark and seek corrective action if appropriate.

We appreciate your consideration of this important matter.

Sincerely,

 John M. Rector
Sr. Vice President and Special Counsel


 Joanne Thelmo
General Counsel and Sr. Vice President

Exhibit A

December 23, 2008

Chairman William Kovacic
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, D.C. 20580

Re: CVS/Caremark Merger

Dear Chairman Kovacic,

As you know in March 2007, CVS, the largest drug store chain, acquired Caremark, one of the three largest Pharmacy Benefit Managers ("PBMs"). I am writing to bring to your attention several recent actions by CVS Caremark that may diminish pharmacy competition and also violate the privacy rights of patients covered by Caremark. We believe these actions may be violations of Section 5 of the FTC Act, and the original acquisition may be a violation of Section 7 of the Clayton Act. We request the opportunity to meet with you and your staff to discuss the need for an investigation of CVS Caremark's conduct.

Competition Concerns

As the Commission staff knows, a PBM plays a critical role in both gathering information from and providing information to the subscriber. Moreover, the PBM often determines critical issues in determining the benefit plan, including the amount of the copay and when it is applicable. When a giant PBM is owned by a pharmacy there is the ability and incentive for the pharmacy to misuse this relationship to diminish competition among non-CVS pharmacies. With the substantial market share CVS possesses in numerous markets, such conduct may raise significant competitive concerns.

Some of the recent conduct by CVS Caremark that raises these concerns include:

- CVS Caremark has significantly reduced the copay for members when they fill their long-term prescriptions at CVS pharmacies. This clearly raises the costs for members for using non-CVS pharmacies;
- CVS Caremark has adopted a program to attempt to steer consumers to CVS pharmacies. When a Caremark member fills a prescription at a CVS pharmacy, the CVS pharmacist is informed through the Caremark electronic system of whether the recipient uses another non-CVS pharmacy. In those situations, the CVS pharmacist is instructed to inform the consumer of the dangers of using multiple pharmacies. Obviously the only way the CVS pharmacists knows the consumer uses multiple pharmacies is through the misuse of consumer information possessed by Caremark; and
- CVS Caremark co-brands its prescription drug card in such a fashion to confuse consumers that the benefit card can only be used at CVS.

We, of course, are not aware of the full range of practices CVS may engage in to use its ownership of Caremark to disadvantage rivals and diminish pharmacy competition. However, the recent institution of some of these practices may suggest that CVS is trying to use Caremark to increasingly dampen competition in the retail pharmacy market.

We recognize that pharmacy chains have owned PBMs for some time; in fact CVS owned a PBM prior to its acquisition of Caremark, and Walgreens has its own PBM. The question may arise why an integrated pharmacy chain/PBM has not engaged in this conduct at some earlier point. The answer is straightforward: the PBMs owned by the chains in those instances were relatively small and thus the vertical integration between chain and PBM did not offer a significant opportunity for the type of exclusionary conduct described above.

Privacy Concerns

As the Commission is well aware both pharmacy chains and PBMs possess a wide variety of personally sensitive information about PBM members. Consumers are particularly vulnerable to misuse of the data because they do not have a direct relationship with the PBM and may be unaware how their personal information is being used. A recent report by Change to Win highlights how CVS Caremark takes advantage of the lack of transparency in their patient relationship to ruthlessly mine data, engaging in a broad spectrum of questionable practices to obtain and misuse patient information.¹

- Many CVS Caremark contracts include provisions that allow the PBM to use patient information “in any manner it deems appropriate” as long as not specifically prohibited by law.² These clauses allow CVS Caremark to sell patient names and prescription records to third parties like health and life insurers who can then use that data to deny coverage or raise premiums;³
- Through a provision in contracts with some plan sponsors, CVS Caremark is allowed to use the data it gets from free discount card-holders to create marketing materials, get manufacturer rebates and promotions that it does not have to disclose, and sell patient information with no restrictions;⁴
- CVS Caremark also recently introduced a new prescribing program, iScribe, which is marketed to physicians as an electronic prescription manager. A physician registering with the program automatically gives CVS the right to “collect Transaction data” – including the patient’s name, address, phone number, date of birth, gender, and prescription data – and sell it to third parties.⁵

¹ Change to Win report, “CVS Caremark: An Alarming Prescription.”

² Change to Win report, “CVS Caremark: An Alarming Prescription,” p 15

³ Change to Win, p 16. See also Terhune, Chad. “They Know What’s in Your Medicine Cabinet,” Business Week, 7/23/08

⁴ <www.businessweek.com/magazine/content/08_31/b4094000643943.htm?chan=top+news_top+news+index_news+%2B+analysis>

⁴ CtW report p 18

⁵ CtW report p 17

These are three examples of how CVS Caremark uses contracts and purported bonus services to secretly obtain specific patient data for its own profit, regardless of the harm to its customers.

In addition to inappropriately selling data the data it gathers, CVS uses personal information to restrict competition by using the data to engage in deceptive marketing practices, often in the form of letters to doctors and patients masquerading as prescription drug education. "The RxReview" program is a prime example of this kind of problematic behavior. Under this program, CVS Caremark sends materials to physicians with specific patient information – full names and prescription history – suggesting that the doctors switch these patients to a different drug. The letters do not disclose that the suggested drugs are often more expensive to the patient's plan but offer a higher rebate or kickback to CVS Caremark, nor do they explain that the mailing has been financed by the manufacturer of the suggested drugs.⁶ RxReview began under Advance PCS, which was acquired by Caremark in 2004, and was the subject of an extensive federal false claims investigation in 2001. However, CVS Caremark has continued the program, along with others like it:

- In October 2007, a Massachusetts judge condemned CVS for advising patients to switch drugs in a direct-to-consumer mailing that was secretly financed by manufacturers and by which CVS profited.⁷
- In June 2008, CVS Caremark sent a letter to one doctor urging that physician to switch several patients – mentioned specifically by name, patient identification number, and date of birth – to Januvia, a Merck diabetes medication that costs between 5 and 11 times more than other comparable treatments.⁸

CVS Caremark may be misusing confidential information by selling mailing rights to manufacturers and convincing patients to switch to drugs with better rebates for the PBM; indeed, the Advance PCS investigation found that the RxReview program reaped profits of about \$40 million in one year.⁹ These programs show a disregard for patients' privacy concerns – and they are especially troubling in light of recent accusations that multiple CVS retail stores have been convicted in Indiana, Texas, and California of disregarding patient privacy concerns by improperly disposing of patient files.¹⁰

We look forward to discussing this with you further. Please let us know if you have any questions.

Sincerely,

⁶ CtW report p 16

⁷ *ibid*

⁸ Marley Seaman, "Unions Accuse CVS Caremark of Pushing Merck Drug," *Forbes* 11/14/08, <<http://www.forbes.com/feeds/ap/2008/11/14/ap5696569.html>>

⁹ CtW report p 16

¹⁰ CtW report p 18

Bruce T. Roberts, RPh
Executive Vice President & CEO
National Community Pharmacists Association

Exhibit B

ReedSmith

Anthony E. DiResta
Direct Phone: +1 202 414 8488
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Reed Smith LLP
1301 K Street, N.W.
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June 11, 2008

Alain Shorr
Division of Privacy and Identity Protection
Federal Trade Commission
601 New Jersey Avenue
Washington, D.C. 20580

Re: CIVIL INVESTIGATIVE DEMAND ISSUED TO "CVS CAREMARK CORPORATION"

Dear Alain:

This letter and documents annexed hereto serve as a preliminary response to the Civil Investigative Demand ("CID") issued to "CVS Caremark Corporation" and received on or about May 22, 2008, as amended by the letter dated June 6, 2008, from Joel C. Winston.

With respect to the production of documents, please know that duplication exists, as documents were received from many sources.

Confidentiality

As with the letters dated November 13, 2007, February 1, 2008, March 17, 2008, March 24, 2008, March 26, 2008, April 3, 2008, April 7, 2008, April 14, 2008, April 15, 2008, May 1, 2008, and any other communications relating to this inquiry, as well as all documents accompanying or related to those communications, the information contained in this letter and accompanying documents constitutes sensitive and proprietary business information of CVS, and are intended to be highly confidential. All such materials are intended only for review by the staff of the Federal Trade Commission. Accordingly, we request that they receive the highest level of protection for confidentiality available under the Commission's Rules of Practice, e.g., 16 C.F.R. § 4.19, the Freedom of Information Act, e.g., 5 U.S.C. § 552(b)(3)(B); 15 U.S.C. § 57b-2(f), the Federal Trade Commission Act, e.g., 15 U.S.C. §§ 46(f); 57b-2, and any other applicable statutes, regulations, and rules.

Objections

CVS objects to the CID on the following grounds:

A. Relevance

CVS objects generally to the CID on the grounds that: (1) the information sought is neither relevant nor reasonably related to the dumping incidents (as articulated in the letter from Alain Shorr to Tina Egan dated September 27, 2007) or the ExtraCare situation (as articulated in Document Specification No. 4) that form the basis for this investigation or the previous inquiry; (2) the FTC does

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not have jurisdictional authority to address issues relating to the disposal of personal health information; and (3) as demonstrated by the information produced to the FTC and the Department of Health and Human Services, Office of Civil Rights, prior to issuance of the CID, the conduct of CVS does not violate the FTC Act or any other applicable laws, regulations, and guidance; and CVS has otherwise operated reasonably under the circumstances.

B. Privilege

CVS objects generally to the CID on the ground that the specifications call for the production of privileged information. As set forth below, certain information is being withheld, and a schedule of withheld items is provided.

C. Confidentiality

CVS objects generally to the CID on the ground that the specifications call for the production of confidential information.

D. Lack of particularity

CVS objects generally to the specifications and definitions set forth in the CID on the ground that the information being requested is not set forth with reasonable particularity, or that the specifications and definitions are otherwise vague and ambiguous.

E. Scope/breadth

CVS objects specifically to the definition of the term "Company" or "CVS" in the CID. As noted below, CVS Corporation merged with Caremark Rx, Inc. ("Caremark") in March of 2007, which is two (2) years after the commencement of the applicable time frame set forth in Instruction No. 1. At the time of the merger, Caremark was a large Prescription Benefits Management company ("PBM") that was not engaged in the retail pharmacy business. Caremark, as a PBM, had no role in the incidents that form the basis of the CID.

F. Scope/time frame

CVS objects to the time frame established by the CID, or the applicable time period set forth in Instruction 1 from June 1, 2005, to the date of complete compliance with the CID, as overbroad and unreasonable. Furthermore, CVS objects specifically to Document Specification No. 7 and Interrogatory Specification No. 1 on the ground that the five (5) years time frame is overbroad and unreasonable.

G. Burdensomeness

CVS objects generally to the CID on the grounds that production of information that is irrelevant, privileged, confidential, and overly broad is unnecessarily burdensome and constitutes improper harassment.

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Subject to these Objections and reserving all rights in connection therewith, CVS shall produce documents and information responsive to Request Nos. 1, 2, 3, 4, and 9, in accordance with the letter dated June 6, 2008, from Mr. Winston, as set forth below.

Caremark

On June 3, 2008, Mark Melodia and I discussed with you our concern about the scope of the CID, particularly in so far as Definition No. 4 defined the terms "Company or CVS" as including the Caremark half of CVS Caremark Corporation. As we pointed out, CVS Corporation merged with Caremark Rx, Inc. ("Caremark") in March of 2007, which is two (2) years after the commencement of the applicable time frame set forth in Instruction No. 1. At the time of the merger, Caremark was a large Prescription Benefits Management company ("PBM") that was not engaged in the retail pharmacy business. Caremark, as a PBM, had no role in the incidents that form the basis of the CID. In response to this representation, you asked us to clarify the electronic connectivity between Caremark (PBM) and CVS (retail).

Tina Egan has confirmed that there is no connectivity between the Caremark and CVS systems that could allow the sharing of personal health information between the systems.

Accordingly, in light of that fact, we assume that the scope of the CID relates solely to the pharmacy, retail side of the Company.

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