STATEMENT OF THE COMMISSION

In the Matter of Omnicare, Inc./NeighborCare, Inc.
File No. 041 0146

The Federal Trade Commission has closed its investigation of Omnicare, Inc.'s tender offer for NeighborCare, Inc. Although the two companies are respectively the largest and likely second-largest institutional pharmacies ("IPs") in the United States today, the evidence uncovered in a thorough investigation indicates that the transaction is not likely to reduce competition.

IPs deliver prescription drugs to residents of long term care ("LTC") facilities – primarily, skilled nursing facilities ("SNFs") – and provide to these SNFs pharmacy and related products and consulting services. IPs buy pharmaceuticals in bulk and package them in "unit-dose" containers according to the specific drug regimens for individual SNF residents. At the IP facility, licensed pharmacists supervise the process by which prescriptions are filled, sorted, and prepared for delivery. SNFs usually receive deliveries at least once daily, seven days per week, and on a 24-hours-per-day emergency basis. IPs are therefore typically located within about 100 miles of their customers.[1]

Omnicare and NeighborCare own IP facilities in 48 states and 33 states, respectively. Two other firms – PharMerica, Inc., and Kindred Healthcare, Inc. – own IP facilities in 39 states and 22 states, respectively. Upwards of one thousand other IPs also compete, primarily regionally or locally, for contracts with SNFs.

Because the delivery range of individual pharmacies is approximately 100 miles, concentration at the state level can provide an indication of potential problems in more localized relevant markets. In multiple states, Omnicare has a greater than 50% share of the SNF beds under contract. In certain of these states, the acquisition of NeighborCare would cause these market shares to grow significantly, and overall IP concentration in those states would be "highly concentrated" under the *FTC-DOJ Horizontal Merger Guidelines*.[2] These structural factors, among other things, prompted Commission staff to conduct a thorough investigation into the transaction's likely effect on competition.

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[1] In addition to SNFs, LTC facilities also include assisted living facilities ("ALFs"). Residents of SNFs primarily are elderly and generally have serious, chronic medical conditions. Residents of ALFs also primarily are elderly, but tend to be more ambulatory, with less severe health care needs, than SNF residents. IPs are, in most cases, the sole providers of prescription drugs to SNF residents. Because SNFs, unlike ALFs, turn virtually exclusively to IPs for pharmacy services, staff focused its investigation on the transaction's competitive implications on the market to supply pharmaceutical products to SNF residents.

[2] U.S. Dep't of Justice and Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 1.51 (Apr. 2, 1992; revised, Apr. 8, 1997).

The Commission has concluded that, under current market conditions, Omnicare's acquisition of NeighborCare is not likely to result in anticompetitive effects – arising either from a unilateral exercise of market power by Omnicare, or from coordinated interaction among remaining rival IPs. In a very high percentage of the areas where Omnicare and NeighborCare both are capable of serving the same SNF – because each has a pharmacy within 100 miles – PharMerica and/or Kindred are also located within 100 miles. Most of the remaining SNFs have three or more independent IPs located within 100 miles. The vast majority of SNFs, therefore, have multiple rival IPs within their service areas.

The investigatory record – including pricing data, customer-loss (bid) data, and scores of interviews and testimony from industry participants – suggests that independent IPs generally are effective rivals to the chain IPs in the service areas where they compete. It is not likely that Omnicare, post-acquisition, could unilaterally impose an anticompetitive increase in price or reduction in quality on SNFs. The record also contains many examples of competitive entry – by, among others, former employees of incumbent IPs that have opened rival firms; retail pharmacies that have expanded into institutional pharmacy; and SNFs, that like Kindred, have vertically integrated. Relatively easy entry conditions in the current marketplace further reduce the likelihood that incumbents, under current market conditions, could profitably sustain a course of coordinated interaction over a significant time period.

Commission staff, however, was also required to evaluate the transaction in light of the substantial changes that will occur in this market next year. On January 28, 2005, the Centers for Medicare & Medicaid Services ("CMS") issued regulations pursuant to the Medicare Modernization Act ("MMA").[3] These regulations, which implement the new Medicare Part D prescription drug program, take effect on January 1, 2006, and will profoundly affect the payment structure for the IP market. In the typical SNF today, the majority of residents receive their drug benefit from state Medicaid programs. IPs, in turn, receive payments from the state Medicaid programs, at rates that each such program sets, for the drugs supplied to these residents.

The MMA shifts Medicaid recipients who are otherwise covered by Medicare to the new Medicare Part D prescription drug program, which private commercial entities – either Medicare Advantage organizations or newly created "prescription drug plans" ("PDPs") – will administer. These organizations will negotiate payment terms and enter contracts with IPs to compensate them for the drugs that they supply to this population of beneficiaries. This new structure is a major change from current practice, in which each state's Medicaid program largely determines the prices it pays IPs for prescription drugs.

Commission staff investigated whether Omnicare, as a consequence of the relatively high number of contracts with SNFs it will have after acquiring NeighborCare, will unilaterally, or

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[3] Medicare Prescription Drug, Improvement and Modernization Act of 2003, P.L. 108-173.

through coordination with rivals, be able to leverage its market position to extract above-market rates from PDPs as a condition of joining their networks. We have concluded that the available facts, on balance, do not support such a theory at this time.

When it announced its Medicare Part D program in January, CMS said that it will "improve competition in the LTC pharmacy market while preserving the pharmacy relationships and levels of service that LTC facilities now enjoy."[4] CMS stated that pharmacies, in negotiating price terms with PDPs, "must do so in a way that provides the best deals for beneficiaries in order to compete."[5] The Agency said that "[t]he changed competitive market under Part D will likely provide opportunities for new players to enter the LTC pharmacy market" and "create better incentives for price competition for the provision of drugs and pharmacy services to LTC facility residents."[6] CMS added that it "anticipate[s] that there may be changes in market share among the pharmacies that service LTC facilities," and that "[t]his changing market will be the result of the competitive situation afforded LTC facilities in choosing LTC pharmacies."[7]

The market that will exist in 2006 is still being formed: PDPs are negotiating contracts with IPs, PDPs must obtain CMS approval for their network arrangements, and other implementation issues are to be resolved prior to the January, 2006, launch date. Should facts later come to light that suggest that Omnicare's acquisition of NeighborCare has reduced competition substantially, the Commission can open an investigation.

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[4] CMS Issue Paper #26, "High-Quality Access to Long-Term Care Pharmacies" (January 21, 2005), available at www.cms.hhs.gov.

[5] Id.

[6] Id.

[7] Id.