STATEMENT OF THE FEDERAL TRADE COMMISSION

In the Matter of Caremark Rx, Inc./AdvancePCS
File No. 031 0239

The Federal Trade Commission has closed its investigation of Caremark Rx, Inc.'s proposed acquisition of AdvancePCS. The transaction involves two of the largest providers of prescription benefit management ("PBM") services in the United States. PBMs administer prescription benefits for most U.S. consumers under contracts with health plans or directly with employers. As part of the Commission's continuing effort to provide transparency to its decision-making process,[1] and to provide guidance about the application of the antitrust laws to mergers in this market, the following statement will outline the reasons for our decision to close the investigation.

The Commission's most recent investigations of the PBM industry include two matters that resulted in consent orders.[2] Each of those matters involved the acquisition by a pharmaceutical manufacturer of a PBM (as opposed to the present situation – the acquisition by one PBM of another). In those two cases, the Commission's complaint identified "the provision

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[1]*See*, *e.g.*, Statement of the Federal Trade Commission, *AmeriSource Health Corporation/Bergen Brunswig Corporation* (Aug. 24, 2001), available at www.ftc.gov/os/2001/08/amerisourcestatement.pdf; Concurring Statement of Commissioner Mozelle W. Thompson, *AmeriSource Health Corporation/Bergen Brunswig Corporation* (Aug. 24, 2001), available at www.ftc.gov/os/2001/08/amerisourcethompsonstatement.pdf; Statement of the Federal Trade Commission Concerning *Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc* and *Carnival Corporation//P&O Princess Cruises plc* (Oct. 4, 2002), available at www.ftc.gov/os/2002/10/cruisestatement.htm; Dissenting Statement of Commissioners Sheila F. Anthony and Mozelle W. Thompson, *Royal Caribbean/Princess* and *Carnival/Princess* (Oct. 4, 2002), available at www.ftc.gov/os/2002/10/cruisedissent.htm; DOJ and FTC Merger Challenges Data, Fiscal Years 1999-2003 (Dec. 18, 2003), available at www.ftc.gov/opa/2003/12/mergereffects.htm; Statement of the Commission, *Sunoco Inc./Coastal Eagle Point Oil Co.* (Dec. 29, 2003), available at www.ftc.gov/os/caselist/0310139/031229stmt0310139.pdf; Statement of Chairman Timothy J. Muris, *Genzyme Corporation/Novazyme Pharmaceuticals, Inc.* (Jan. 13, 2004), available at www.ftc.gov/os/2004/01/murisgenzymestmt.pdf; Dissenting Statement of Commissioner Mozelle W. Thompson, *Genzyme Corporation/Novazyme Pharmaceuticals, Inc*. (Jan. 13, 2004), available at www.ftc.gov/os/2004/01/thompsongenzymestmt.pdf; Statement of Commissioner Pamela Jones Harbour, *Genzyme Corporation/Novazyme Pharmaceuticals, Inc*. (Jan. 13, 2004), available at www.ftc.gov/os/2004/01/harbourgenzymestmt.pdf; FTC Horizontal Merger Investigation Data, Fiscal Years 1996-2003 (Feb. 2, 2004), available at www.ftc.gov/opa/2004/02/horizmerger.htm.

[2]*Merck & Co., Inc.*, 127 F.T.C. 156 (1999); *Eli Lilly and Company, Inc.*, 120 F.T.C. 243 (1995), *order set aside*, 127 F.T.C. 577 (1999).

of [PBM] services by national full-service PBM firms" as a relevant market.

Even though the potential competitive effects of the proposed Caremark/AdvancePCS acquisition differ from those identified in *Merck* and *Eli Lilly*, we believe that the market definition advanced in those two settled cases retains its vitality when we analyze the impact of the present transaction on large employers that require broad PBM service offerings on a national scope. On the other hand, the investigation showed that dozens of small, often regionally-oriented PBMs provide sufficient service offerings to smaller employers (and will continue to do so post-acquisition). In light of this evidence, the investigation turned its attention to the large employers that are more likely to desire the broad service offerings of national, full-service PBMs.

We concluded that these large employers are not likely to encounter anticompetitive effects from the acquisition in light of the competition that will exist following this transaction. Competition from the remaining independent, full-service PBMs with national scope – Medco, Express Scripts, and the merged Caremark/AdvancePCS[3] – and significant additional competition from several health plans and several retail pharmacy chains offering PBM services should suffice to prevent this acquisition from giving rise to a potentially anticompetitive price increase.

We also considered whether the proposed acquisition would confer monopsony (or oligopsony) power on PBMs when they negotiate dispensing fees with retail pharmacies. It is important not to equate market concentration on the buyer side with this kind of power. For example, a shift in purchases from an existing source to a *lower-cost, more efficient* source is not an exercise of monopsony power. 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. This bargaining power is procompetitive when it allows the buyer to reduce its costs and decrease prices to its customers.

A buyer has monopsony power – or a group of buyers has oligopsony power – when it can profitably reduce prices in a market below competitive levels by curtailing purchases of the relevant product or service. The exercise of this power causes competitive harm because the monopsonist or the group will shift some purchases to a less efficient source, supply too little output to the downstream market, or do both.

In the present case, there is no reason to expect a monopsony or oligopsony outcome – *i.e.*, one in which overall purchases from pharmacies are reduced – even if the acquisition enables the merged PBM (or PBMs as a group) to reduce the dispensing fees they pay to retail pharmacies. Characteristics of the relevant market make monopsony or oligopsony power

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[3]Even in the segment on which this investigation concentrated (PBM services furnished to large employers), there was evidence that customers generally did not view Caremark and AdvancePCS as each other's closest competitors.

unlikely. For example, contracts are individually negotiated between each PBM and each retail pharmacy company.[4] In any event, the post-acquisition share of the merged firm for all purchases of prescription dispensing services would be below the level at which an exercise of monopsony power is likely to be profitable.[5]

At most, the acquisition is likely to increase the bargaining power of the merged PBM and to increase its shares (and correspondingly reduce the pharmacies' shares) of the gains flowing from contracts between the PBM and the pharmacies. It is likely that some of the PBM's increased shares would be passed through to PBM clients.[6] Although retail pharmacies might be concerned about this outcome, a reduction in dispensing fees following the merger could benefit consumers.

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[4]In conventional monopsony and oligopsony models, all sales take place at a single price. A reduction in price is associated with a movement downward along the supply curve to a lower quantity. By contrast, each contract between a PBM and a pharmacy company is subject to individual negotiation. Both the PBM and the pharmacy have the incentive to contract for the efficient quantity, while bargaining on the price in order to determine how the gains from the transaction are divided between them. In this situation, an increase in the bargaining power of the buyer may lead to a lower price, but there is no reason to expect a lower price to lead to a lower quantity.

[5]U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, § 0.1 (Apr. 2, 1992; revised, Apr. 8, 1997).

[6]We anticipate that competition among PBMs will remain vigorous in the wake of the Caremark/AdvancePCS acquisition, and that this competition is likely to cause PBMs to pass on at least some of their cost savings to their customers in order to gain or retain their business.