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23. In 2007, the FTC investigated CVS Corporation's acquisition of Caremark Rx, Inc. At the time of the merger, CVS was a large pharmacy chain with a small PBM, PharmaCare, while Caremark was a large PBM but had no retail pharmacies. Due to the limited nature of any horizontal overlap, and no clear evidence of potential harm from the creation of the vertical relationship, the FTC took no enforcement action. However, even when the Agencies do not challenge a merger, they continue to monitor the combined firm's conduct and address any competitive problems. Shortly after the merger, and in response to several complaints, the FTC conducted an investigation to determine whether CVS Caremark engaged in unfair methods of competition under Section 5 of the FTC or made acquisitions in violation of Section 7 of the Clayton Act. After a thorough and comprehensive competition review, the Commission determined that no additional action was warranted.<sup>26</sup>

### 2.2.3 *Pharmaceutical Wholesalers*

24. The Commission has investigated and taken action against mergers in the pharmaceutical wholesaler market. These matters include the litigated matter against Cardinal Health and McKesson. In this case, the Commission authorized staff to file separate motions in federal district court to block the mergers of the nation's four largest drug wholesalers into two wholesale distributors of pharmaceutical products. The Commission charged that Cardinal's proposed acquisition of Bergen Brunswig Corporation and McKesson Corporation's proposed acquisition of AmeriSource Health Corp. would substantially reduce competition in the market for prescription drug wholesaling and lead to higher prices and a reduction in services to the companies' customers—hospitals, nursing homes and drugstores—and eventually to consumers.<sup>27</sup> Two separate motions for preliminary injunctions were filed in the U.S. District Court for the District of Columbia March 6, 1998. On July 31, 1998, the District Court granted the Commission's motions enjoining both proposed mergers.<sup>28</sup> The parties abandoned their respective merger plans soon after the decision.

### 2.2.4 *Pharmacies*

25. The FTC has brought several enforcement actions in mergers involving chain pharmacies (Rite Aid/Revco; J.C. Penney/Eckerd; Rite Aid/Alan Coutu) and institutional pharmacies (Omnicare/PharMerica/uteec0021 nati

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would require disclosures to physicians of PBMA financial information whenever a “drug switch”

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34. Some of the legislative proposals also would ban mail-order pharmacies from payor networks. In replying to requests for comment, FTC staff noted that a recent U.S. General Accounting Office (GAO) empirical study had found that mail-order prices generally were well below the prices offered by retail pharmacies in GAO's sample.<sup>50</sup> FTC staff explained that restricting a health plan's ability to offer favorable treatment to a low cost mail-order pharmacy would undercut pharmacies' incentives to bid aggressively for a share of that health plan's business, that reducing those incentives is likely to raise the prices that consumers pay for the prescription drugs that their health plans cover. Some cost increases may be passed on to plan beneficiaries in the form of higher out-of-pocket prices. In some cases, health benefit plans may respond to higher costs by reducing the scope of prescription drug coverage, or by eliminating prescription drug coverage entirely. Although these bills may seek to enhance consumers' ability to fill prescriptions at pharmacies of their choice, they would impede health competition between retail and mail-order pharmacies, to the detriment of consumers.

35. The FTC submitted testimony before Congress in 2007 and 2012 regarding bills that would provide antitrust immunity to independent or community pharmacists in their reimbursement negotiations with PBMs.<sup>51</sup> In both cases, the Commission opposed antitrust exemptions that would allow pharmacists to engage in collective bargaining to secure higher and more favorable contract terms from health plans. The Commission warned Congress that the proposed exemptions threatened to raise drug prices for consumers and to increase costs to employers who provide health insurance to employees and retirees, without any assurance of offsetting higher quality care. The FTC was concerned that increasing costs to employers could result in reducing or eliminating those benefits.

### 2.3.2 Staff Advisory Opinions

36. Anticompetitive conduct may be discouraged, and efficient and often procompetitive conduct encouraged, not only through litigation, but through informal consultations and through the Agencies' formal advisory opinion programs, undertaken prior to the requestor's engaging in the conduct. This has been true of conduct in the pharmaceuticals industry, as elsewhere.

37. For example, the RX-360 International Pharmaceutical Supply Chain Consortium ("RX-360") — a consortium of pharmaceutical and biotechnology companies — recently sought FTC Staff guidance concerning RX-360's planned joint supplier quality and safety audit programs. Upon review of information provided by RX-360 and its members, FTC staff replied that the audit programs apparently: (1) do not require exchanges of competitively significant information; (2) contain protections to reduce Rx-360 members' ability to use the programs for anticompetitive ends; (3) protect audited firms from concerted

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would prohibit PBMs from using mail-order pharmacy services except on written request of covered persons.

<sup>49</sup> See, e.g., the Rhode Island Letter *supra*.

<sup>50</sup> See Rhode Island Letter *supra*, at 31, discussing findings of *Prescription Drug Discount Cards*, U.S. General Accounting Office, GAO-03-912, September 2003, p. 11.

<sup>51</sup> Testimony of David Wales (October 18, 2007) re Community Pharmacy Fairness Act of 2007, *see at* [http://www.ftc.gov/sites/default/files/documents/public\\_statements/prepared-statement-federal-trade-commission-concerning-community-pharmacy-fairness-act-2007/p859910pharmadfr1fmmn93\\_34.3Tc\\_0.9/n5](http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-concerning-community-pharmacy-fairness-act-2007/p859910pharmadfr1fmmn93_34.3Tc_0.9/n5)

