United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Commissioner

August 19, 2014

<u>Via Electronic Submission</u>

Larry Good
Executive Secretary
ERISA Advisory Council
U.S. Department of Labor, Suite N-5623
200 Constitution Avenue NW
Washington, DC 20210

Dear Mr. Good,

The Directors of the Federal Trade Commission Office of Policy Planning, Bureau of Economics, and Bureau of Competition (collectively, FTC staff) today submitted a letter commenting on the ERISA Advisory Council's (the Council's) deliberations regarding PBM Compensation and Fee Disclosure. I write separately to explain why I respectfully disagree with the position staked out in the FTC staff's letter, and to inform the Council about the FTC's current information regarding the pertinent issues before the Council.

The primary focus of the Council's inquiry is a determination "examining the current status of the need for and potential scope of compensation and fee disclosures by PBMs under Section 408(b)(2), whether such information is necessary for plan administrators to determine if reasonable compensation is being paid for PBM services under the statute, and how mandatory compensation and fee disclosures might impact the provision of prescription drug services to participants and beneficiaries of health care benefit plans and the costs of plan administration."[1] To further its inquiry, James Singer, the Issue Chair of the PBM Team on the ERISA Advisory Council, sent a list of questions to the Federal Trade

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[1] US Dep't Labor, 2014 issue statement for the ERISA Advisory Council, PBM Compensation and Fee Disclosure, available at http://www.dol.gov/ebsa/publications/2014issuestatement1.html.

believe the Council should place the FTC staff's position in its appropriate context in light of my view that the FTC lacks current and relevant information about the particular issue – the potential benefits and harms from compensation and fee disclosure requirements – before the Council.

The first relevant change in the market since 2005 that should be considered is the effort in recent years of the states to require some level of PBM transparency. The states investigated widespread evidence of deceptive and fraudulent practices within the industry in the months and years following the FTC's 2005 PBM study.[6] These investigations have led at least 29 states to enact laws that regulate PBMs by, among other things: requiring PBMs to be more transparent with their clients about compensation and rebates; requiring fair audits of pharmacies; licensing PBMs; and requiring Maximum Allowable Cost (MAC) disclosure.[7] The FTC's 2005 PBM study could not have taken account these state laws – and the competitive effect (if any) they have had on the market or on the FTC's conclusions about the competitive effects of plan design – since these laws were enacted after the FTC published its study.

Second, the FTC staff letter implies that the FTC's 2012 review of the ESI/Medco merger confirmed the 2005 study's conclusion that mandatory compensation and fee disclosures are unnecessary, or might somehow be detrimental to market competition.[8] Yet the FTC's ESI/Medco merger review did not focus on the issue of the competitive effects of *different* PBM plan designs, or the competitive effects of state law requirements that mandated either transparent plan designs or the inclusion of proposals with transparent plan designs as a component of PBM bids to plan sponsors. Indeed, to the extent that a majority of the Federal Trade Commission[9] found that the ESI/Medco merger review indicated PBM competition was "intense," it is possible that the level of competition that the majority found in the market was *because of*, rather than in spite of, the changes in

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[6] U.S. v. AdvancePCS Settlement, September 7, 2005; State of Illinois et al. v. Caremark, Inc., February 14, 2008; State of Vermont et al. v. Express Scripts, Inc., May 27, 2008.

[7] *See* http://www.ncpanet.org/pdf.leg/nov12/pbm_enacted_legislation.pdf (chart of state laws as of Nov 2012); http://www.pbmwatch.com/current-state-mac-legislation.html (chart of current state MAC disclosure laws).

the state legislative landscape since 2005. Simply put, from the perspective of the Council's current inquiries, the FTC's merger review did not attempt to separate *the signal* of the effect of different plan designs – including fee and compensation transparency provisions, whether mandated by state law or voluntary – from *the noise* of the overall level of competition in the PBM market place.[10]

Third, the suggestion made by the Commission majority in 2012 that PBM competition "is intense" is debatable and, I believe, not an argument that should sway the Council's deliberations either way. However, because the Advisory Council expressed interest in my views about the 2012 ESI/Medco merger,[11] I'll note that I continue to believe the PBM industry was then – and remains today - highly consolidated. At the time of the merger, the Big Three PBMs (ESI, CVS Caremark, and Medco) had a combined market share of between 80 and 90 per cent in the large commercial employer market, the antitrust market that the FTC had used in the past to assess the competitive effects of prior PBM mergers.[12] Broadening this market out to include all employers, the combined ESI/Medco had a post-merger share of 45 per cent and the Big Three had a combined 73 per cent market share. Even in an all employer market, the Big Three's nearest competitor, Aetna, had a market share well below 10 percent following the merger of ESI and Medco.[13] This market structure, combined with the 90 per cent customer retention rate and significant installed bases enjoyed by the Big Three,[14] all pointed – in my careful estimation – toward a market that, once the merger was consummated, would become a "duopoly with few efficiencies in a market with high entry barriers – something no court has ever approved."[15]

As I also explained in my 2012 dissent regarding the ESI/Medco merger, the market as then-structured had already shown signs that coordination between the

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[10] Silver, *The Signal and the Noise – Why So Many Predictions Fail, But Some Don't* (Penguin Press 2012).

[11] *See* Singer July 22nd email, *supra* note 2. In Appendix A to this letter, I respond to all of the particular questions posed by Mr. Singer in his July 22nd email to the FTC.

[12] Dissenting Statement of Commissioner Julie Brill Concerning the Proposed Acquisition of Medco Health Solutions by Express Scripts, Inc., FTC File No. 110-0210 (Apr. 2012) (Brill Dissent), available at: http://www.ftc.gov/sites/default/files/documents/public_statements/dissenting-statement-commissioner-julie-brill/120402medcobrillstatement.pdf, at 2.

[13] *Id.* at 3.

[14] *Id.* at 6.

[15] *Id*. at 7, citing *FTC v. H.J. Heinz Co.,* 246 F.3d 708, 717 (D.C. Cir. 2001).

players was feasible and ongoing. I found this to be evidenced in statements made by the ESI CEO to his senior executive team in ordinary course company documents, as well as public statements made by Medco's senior leadership to analysts, both of which pointed to customer allocation between the large PBMs.[16]

In sum, I disagreed with the majority of my fellow Commissioners that – in 2012 – competition in the PBM marketplace could be characterized as "intense," and I remain unconvinced of this today.

As a matter of fact, concentration levels in the PBM industry appear to have *increased* even more since the ESI/Medco merger in 2012. This apparent increase is a result of the subsequent merger between SXC and Catalyst in April 2012, a merger that was not investigated by the FTC in any meaningful way.[17] The FTC staff might argue that – as a matter of economic theory – this structural change in the marketplace since the Commission investigated the ESI/Medco was not ie8gtla] 0 Tw (a] 0

Back in 2012 I called on the Commission to conduct a thorough analysis of the PBM market in order to test whether the then-majority's prediction – that a merger to duopoly would not have anticompetitive effects – has been borne out in the real world.[18] At an oversight hearing before the House Commerce Committee on December 3 last year, in response to a question from Rep. Jeanne Schakowsky, I reiterated my call for the FTC to study the PBM market in order to examine whether the ESI/Medco merger and other recent market developments have led to a market that suffered from competition concerns.[19] Such a study could include a re-evaluation of the competitive impact of different plans designs in light of the significant market changes since the FTC last examined this question a decade ago.

In sum, I ask the Council to consider that the FTC staff letter does not represent my views. I also ask the Council to consider the FTC's current level of knowledge regarding the competitive effects of different plan designs in the

Regulation for the financial services industry when providing services to retirement plans.

6. In July 2014, the National Academy of Social Insurance issued a report titled "State Policies on Provider Market Power" which is located at: http://www.nasi.org/sites/default/files/research/State_Policies_Provider_Market_Power.pdf. Has the FTC studied the impact on competition of State laws related to the disclosure PBM compensation transparency and similar disclosures for hospitals and other health care providers? If so, please explain.

Response 6: As described in Commissioner Brill's Aug 20, 2014, letter, the vast majority of these state laws were enacted after the FTC's 2005 PBM study. To date, the FTC has not studied the impact on competition of State laws related to disclosure of PBM compensation, or state laws related to similar disclosure requirements for hospitals and other health care providers.