



**Consumer Federation of America**

1620 I Street, N.W., Suite 200 \* Washington, DC 20006



September 20, 2011

The Honorable Jon Leibowitz  
Chairman  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, D.C. 20580

Re: Proposed Merger of Express Scripts, Inc. and Medco Health Solutions

Dear Chairman Leibowitz,

We, the undersigned, are the nation's leading consumer advocacy groups committed to protecting the public interest in competitive markets.<sup>1</sup>

We believe that competitive markets benefit all consumers by maintaining lower prices, promoting innovation, and developing efficiencies. We write you today to express our opposition to Express Scripts' proposed acquisition of Medco Health Solutions and to commend the Commission for issuing a second request for information in this investigation. In light of the proposed acquisition's potential for significant consumer harm, the Commission's second request signals a commitment that this deal, and the concerns of consumers, will be carefully and adequately reviewed.

By merging two of the three largest pharmacy benefit managers ("PBM"), this deal would significantly reduce competition in the PBM market and harm consumers in four significant ways:

- Substantially reducing competition in the PBM market, resulting in increased costs to plans, employers, and ultimately, consumers;

- Increasing the incentive and ability for the merged company to create highly restrictive pharmacy networks, thereby restricting patient choice;
- Establishing tremendous dominance for Express Scripts in the specialty pharmacy area, likely resulting in decreased access to care for our most vulnerable patient populations; and
- Limiting access to new and innovative drugs by creating a market landscape more conducive to deal-making between PBMs and pharmaceutical manufacturers.

First, this merger will significantly reduce competition among the major PBMs. By reducing market rivalry, Express Scripts-Medco is likely to charge more for its services. Furthermore, the combined company is unlikely to pass on savings obtained through rebates to public and private payors. Ultimately, consumers will bear these price increases in the form of higher premiums.

The combination of Express Scripts and Medco will also increase the incentive and ability for the merged company to create highly restrictive pharmacy networks, which will exclude numerous retail community pharmacies and specialty pharmacies, and therefore significantly limit patient choice. The merger will have two particularly pernicious effects on the retail pharmacy industry. First, the combined firm will control the contracts that allow retail community pharmacies in the Express Scripts - Medco network to serve patients. Secondly, Express Scripts - Medco will be able to tie its dominant market power in the pharmacy PBM market into the mail-order dispensing market. This would allow Express Scripts - Medco the ability to restrict patient choice to drive patients to their own mail-order facilities.

Third, by granting the joint company over a 50 percent market share in the specialty pharmacy area, the merger is of particular concern to the 57 million Americans that rely on specialty drugs.<sup>1</sup> Specialty drugs are typically expensive treatments that require special handling or administration. These drugs provide treatment for our nation's most vulnerable patient populations who suffer from chronic, complex conditions such as hemophilia, Crohn's Disease, Hepatitis C, HIV/AIDS, and many forms of cancer.

This incredible consolidation of the specialty market is of particular concern given the rapidly increasing cost of specialty pharmaceuticals. Specialty drug prices increased by 19.6 percent in 2010 compared to a 1.4 percent increase for traditional retail drugs. Additionally, this trend of increasing specialty drug prices is only expected to worsen, potentially reaching as high as 27.5 percent by 2013.<sup>2</sup>

We are concerned that by granting Express Scripts such incredible dominance of the specialty pharmacy market, the merger would decrease access to these critical treatments by restricting patient choice in pharmacies and increasing the potential for price gauging. Enhancing Express Scripts - Medco specialty pharmacy operations will only increase the incentive for the company to drive patients in-house and away from the patient's specialty provider of choice.

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<sup>1</sup> Center for Studying Health System Change, 2003 Community Tracking Study (CTS) Household Survey.

<sup>2</sup> Express Scripts. *2010 Drug Trend Report: A Market and Behavioral Analysis* (April 2011).

Moreover, given the prevalence of limited distribution drugs in the specialty area, the dominance of post-merger Express Scripts - Medco would give the company the unique power to increase the cost of specialty pharmaceuticals at will.

It is important to point out that the specialty pharmacy market is a relatively new and still developing area, and no single business model has proven to be most efficient. The innovation necessary to help this market to evolve in the most cost-effective manner would be greatly crippled by the merger.

Finally, we are concerned that the merger could limit access to new and innovative drugs as further consolidation of this market more readily allows Express Scripts - Medco to establish arrangements with drug manufacturers that can exclude consumer access to certain drugs. Pharmaceutical manufacturers must go through a PBM to get their drugs on formularies and it is this very relationship that positions PBMs to negotiate pharmaceutical rebates. By limiting the number of “PBM gate-keepers” from 3 to 2, this merger would increase the ability for manufacturers to engage in kickback or rebate arrangements with Express Scripts-Medco to favor their own drugs and keep other new, innovative drugs off formularies.

The proposed merger will significantly reduce competition and, in turn, cause significant harm to consumers. We urge the Commission to thoroughly review these consumer concerns in their investigation and to particularly focus on the impact on the *ultimate* consumer—the patient. We look forward to meeting with Commission Staff and providing any information and analysis the Commission would find helpful.

Please feel free to contact us with any questions or for additional information.

Sincerely,

**Consumers Union**  
**Consumer Federation of America**  
**U.S. PIRG**  
**National Consumers League**  
**NLARx**

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<sup>i</sup>About our organizations:

The Consumer Federation of America (CFA) is composed of over 280 state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power and cooperative organizations, with more than 50 million individual members. CFA represents consumer interests before federal and state regulatory and legislative agencies, participates in court proceedings and conducts research and public education.

Consumers Union, publisher of *Consumer Reports*, is an expert, independent, nonprofit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves.

NLARx is a nonpartisan, nonprofit organization founded and directed by state legislators. Our mission is to assist legislators who seek to work jointly across state lines to make prescription drugs more affordable and accessible to people in the United States, especially by reducing prescription drug prices.

The National Consumers League is America's oldest consumer organization, representing consumers and workers on marketplace and workplace issues since 1899. NCL provides government, businesses, and other organizations with the consumer's perspective on concerns including child labor, privacy, food safety, and medication information.

U.S. PIRG, the federation of state Public Interest Research Groups (PIRGs), stands up to powerful special interests on behalf of the American public, working to win concrete results for our health and well-being. With a strong network of researchers, advocates, organizers and students in state capitols across the country, we take on the special interests on issues, such as product safety, political corruption, prescription drugs and voting rights, where these interests stand in the way of reform and progress.