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UPDATE: Pepsi Ruling May Have Meaning For FTC's Review Of CVS

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(Adds detail about Congress members in ninth paragraph, clarifies Ticketmaster information in 13th paragraph, adds share price in last paragraph.)

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A recent Federal Trade Commission move to place conditions on a soda industry acquisition could have implications for the agency's ongoing probe of business practices at merged pharmacy giant **CVS Caremark** Corp. (CVS).

While the FTC allowed PepsiCo Inc.'s (PEP) $7.8 billion acquisition of two large bottlers, it required the soft-drink maker to establish a firewall to restrict its access to private business information about competitor Dr Pepper Snapple Group Inc. (DPS), which the bottlers also serve.

That action could be relevant for **CVS Caremark**, given allegations by independent pharmacists that the merged company has improperly used private patient information from its Caremark pharmacy-benefits-management operation to steer them to its CVS chain drug stores. CVS says it already has a firewall in place, although critics complain it isn't working.

"There are parallels between the two cases," said Fiona Schaeffer, a Weil, Gotshal & Manges LLP antitrust partner, who isn't involved in the PepsiCo or **CVS Caremark** cases. The PepsiCo case shows "that the FTC is interested in and able to use firewalls to remedy concerns about vertical mergers" and about the flow of competitors' information, she said.

Schaeffer said the FTC could transform **CVS Caremark**'s self-imposed firewall into a mandated one, although it's more difficult to negotiate remedies after a merger has closed. However, the FTC was able to do so years after drug maker Merck & Co.'s (MRK) 1993 acquisition of pharmacy benefits manager Medco, which Merck eventually spun into Medco Health Solutions Inc. (MHS).

It's unclear exactly how a mandated firewall might affect CVS operations. For its part, **CVS Caremark** says it's doing nothing wrong.

"We remain confident that our business practices and service offerings are being conducted in compliance with antitrust laws. Moreover, we maintain a firewall to ensure that certain competitively sensitive information is not shared between our pharmacy service business and retail operations," the company said through a spokeswoman.

CVS Caremark was formed in 2007 when the CVS retail pharmacy chain paid $27 billion for Caremark Rx, a pharmacy benefits manager that handles millions of prescription claims for **clients**' employees or health-plan members, and operates a mail-order pharmacy.

Last year, the FTC told **CVS Caremark** that it was conducting a nonpublic investigation. While the agency hasn't elaborated publicly, it initiated the probe after receiving complaints from independent pharmacists and patients, and after lawmakers asked the agency to review the company's post-merger business practices. Several U.S. senators and House members, citing such complaints, urged the FTC to re-examine the merger.

Community pharmacists and patients complain **CVS Caremark** used information about prescriptions for members in its pharmacy benefits manager, or PBM, to force them to buy their maintenance medications through **CVS Caremark** retail or mail-order pharmacies.

CVS says that for Caremark PBM members whose employers use a "mandatory mail" benefit plan for maintenance drugs, it simply offers a choice to pay lower mail-order prices at its stores. **CVS Caremark** doesn't decide how much a copay should be or whether a prescription should be filled through the mail or at a particular retail pharmacy; the client makes those decisions in adopting a plan design, CVS said.

CVS retail stores have been gaining market share since the merger, while the pharmacy benefits management operation last year encountered marketing and service problems and lost several billion dollars' worth of accounts for 2010.

Community pharmacists also complain that **CVS Caremark** imposes "penalty" copayments on some Caremark members who don't use the company's mail-order pharmacy or a CVS store. The Justice Department recently imposed nonretaliation obligations in connection with Live Nation Entertainment Inc.'s (LYV) Ticketmaster acquisition, which could inform the FTC's review of CVS if it finds the complaints have merit, Schaeffer said.

CVS Caremark said the PepsiCo and Live Nation cases are unrelated to the FTC's investigation of **CVS Caremark**. Others disagree.

"If Dr Pepper needs the protection of the Federal Trade Commission...don't a bunch of community pharmacies need this protection even more?" said David Balto, an attorney and former FTC competition bureau policy director now with the Center for American Progress, who has been working with the National Community Pharmacists Association in asking the FTC to reopen the **CVS Caremark** merger.

PepsiCo, under a consent order the FTC proposed last month, must set up a firewall to ensure its ownership of the bottlers doesn't give it access to commercially sensitive Dr Pepper Snapple marketing and brand plans. The FTC said access to the information would have harmed competition in the U.S. market for carbonated soft drinks.

Pepsi rival Coca-Cola Co. (KO), which recently announced a deal to acquire the bulk of its largest bottler, is likely to face similar scrutiny from the FTC because its bottler also distributes Dr Pepper Snapple products.

CVS Caremark closed up 20 cents at $34.93 on Tuesday.

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