Questions for the Record from Senator Charles E. Schumer

for witnesses at Senator Judiciary Committee Hearing on

"The Express Scripts/Medco Merger:

Cost Savings for Consumers or More Profits for the Middlemen"

December 6, 2011

- How would the merger of Express Scripts and Medco affect community pharmacists' ability to provide quality care and services to their patients—particularly in rural communities, inner cities and other underserved areas?

  The proposed Express Script-Medco merger would limit the ability of community pharmacies to provide quality care and services to their patients and would particularly harm consumers located in rural communities, inner city and other underserved areas. Post-merger, Express Scripts will have a greater ability to drive down reimbursement to pharmacies below competitive levels. Cutting reimbursement to pharmacies which already operate on very minimal margin would force many pharmacies to respond by cutting back on hours, services, and employers. Also posing a serious financial threat for community pharmacies is the fact that Express Scripts-Medco will have a greater incentive and ability to drive patients away from their pharmacies of choice and into their mail order. Losing clients in this manner will furthermore impact the ability of community pharmacies to provide quality service to their patients.

  This diminished pharmacy access and service will particularly harm the consumers that reside in rural communities, inner cities, and other underserved areas. Consumers in these areas often depend heavily on their local community pharmacy for a wide-range of acute health care needs. In many cases in rural or inner city communities, the local community pharmacy is the most accessible health care professional. This is why the New York legislature recently passed legislation banning employers and insurers from forcing patients to use mail order plans for prescription drugs.[1] Threatening the financial well-being of community pharmacies and their ability to serve their communities, this merger seriously harms the access rural and inner city patients have to quality pharmacy care.

- How would this merger impact patients and pharmacies in the Medicare Part D program?

  Many public programs, such as Medicare Part D, have recognized the conflicts of interest and consumer harm that results from the self-dealing practices of many PBMs and have accordingly addressed these issues with "any willing provider" provisions. Medicare Part D patients will nonetheless be harmed by decreased pharmacy service and access as their local community pharmacy is forced to respond to cuts in compensation by reducing hours,

[1] http://assembly.state.ny.us/leg/?default_fld=&bn=A05502&term=2011&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y.

services, and employees. Given the reduced rivalry in the PBM market, we can also expect that the major PBMs will charge public payors, such as Medicare Part D, more for their services.

Attempts to introduce transparency into the PBM process have failed. As evidenced in the March 2011 report by the Department of Health and Human Services, Office of Inspector General entitled "Concerns with Rebates in the Medicare Part D Program" Medicare part D "holds sponsors ultimately responsible for accurately reporting rebates and ensuring that their PBMs comply with CMS requirements." However the report also concludes that plan sponsors are often incapable of adequately managing PBMs due to complex contractual relationships, lack of transparency, and asymmetric auditing practices.

Medco CEO David Snow attempted to assuage these concerns during his testimony by asserting that PBMs are regulated by every state's board of pharmacy and every state insurance commissioner. However, as best described in a follow-up letter by the National Association of Chain Drug Stores, this is simply not the case.[2] Furthermore, ERISA is not designed to oversee even the most basic PBM activities, including network formulation, reimbursement arrangements, and claims processing.

Given the aggressive tactics employed by the PBMs, and the lack of regulatory oversight, one can fully expect the merger of Express Scripts and Medco to worsen an already difficult situation for Medicare Part D patients and pharmacies.

- Two recent reports from the Health & Human Services Office of Inspector General have found that PBMs are not adequately sharing savings with Medicare patients and that PBMs underestimate the rebates they receive from manufacturers—ultimately resulting in higher Medicare costs for both beneficiaries and taxpayers. Based on the findings of the OIG reports, how can we be assured that this merger will drive the best bargain for patients, for public and private payers, and for taxpayers?

  Simply put, we cannot be sure that this merger will drive the best bargain for patients, public and private payers, and taxpayers. In fact, quite to the contrary, it is very likely that this merger will be harmful to all four. Currently there are three dominant PBMs in the industry that already engage in conduct that proves harmful to consumers at all levels, such as not passing savings on to Medicare customers, and underestimating rebates from pharmaceutical manufacturers. If this merger consummates, this harmful conduct will only be exacerbated.

  The Health & Human Services Office of Inspector General report entitled "Medicaid Recovery of Pharmacy Payments from Liable Third Parties" captures some, but not all, or the tactics employed by large PBMs to exploit their ability to exploit their unique position. For instance, PBMs may make it extremely hard to submit a claim, impose

[2] Letter from Steven C. Anderson, President, NACDS, to the Honorable Senator Herb Kohl, December 13, 2011, *available at* http://www.nacds.org/user-assets/pdfs/2011/newsrelease/Comments%20to%20SJC%20on%20PBM%20merger.pdf.

unreasonable time restrictions, or compel the State to submit information several times before awarding a claim.[3]

It is important to reemphasize the inherent conflict of interest that PBMs face. On one hand, they provide an intermediary service designed to aggregate bargaining power with the goal of lowering the prices paid to pharmaceutical manufactures and retail pharmacies. On the other hand, they own and operate mail order pharmacies and they have an incentive to maximize the revenues of the mail order facilities. The natural result is an entity that wields significant bargaining power, but passes on only the bare minimum savings to the consumer health plans and Medicare purchasers. Only competition in the market can provide sufficient incentive for PBMs to pass through a greater portion of the savings to the consumers. This merger would eliminate competition, further incentivize the PBMs to pass through fewer savings to consumers, and ensure greater struggle for state Medicare purchasers to obtain full value from their PBM in the future.

With respect to rebates, there is conflicting information. Medco has stated in its 10K filing with the SEC that it only keep 12.5% of the rebates for itself, and presumably passes the other 87.5% on to consumers. However, the Health & Human Services Office of Inspector General report entitled "Concerns with Rebates in the Medicare Part D Program" calls this reporting into question. This report finds that sponsors often have "complex contractual relationships"[4] that lack transparency, thereby suggesting that there is no accounting or verification mechanism for filings claiming to offer such high pass through rates. Furthermore, this report also notes that "sponsors received rebates when they encouraged beneficiaries to use certain drugs." This means that rebates are not automatically granted to PBM clients, but rather are conditioned upon selecting certain drugs, which may or may not prove to be the most cost-effective or therapeutic. Such a finding calls into question not only the PBMs' ability to manage their conflict of interest, but also their commitment to offering the highest level of care to consumers.

[3] Department of Health and Human Services, Office of Inspector General, "Medicaid Recovery of Pharmacy Payments from Liable Third Parties" at 9.
[4] Department of Health and Human Services, Office of Inspector General, "Concerns with Rebates in the Medicare Part D Program" at ii.