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CVS faces probes by FTC, HHS, DEA; CEO Ryan to retire

By Lynn Shapiro

CVS Caremark's chairman of the board and chief executive officer, Thomas M. Ryan, the man who built CVS from a small New England chain into a $100 billion company, is being dogged by controversy.

For one thing, the Federal Trade Commission (FTC) is looking into a charge by independent pharmacists that he is using Caremark's pharmacy benefit manager muscle to force customers to switch their prescriptions to CVS. He is also the subject of other government probes, including one into allegations of insider trading.

On May 12, CVS announced that Ryan, 57, would retire in May 2011, after 36 years with the company, including 16 years in a leadership role. Larry J. Merlo, 54, the company's president and chief operating officer, will succeed him.

In the interim, the company will be run as a troika by Ryan, Merlo, and Caremark's executive vice president, Per Lofberg, while Ryan provides evidence in response to the charges leveled against him.

The FTC probe

Both the FTC's consumer protection bureau and its competition bureau are spearheading an investigation into monopolistic practices alleged to have been practiced by CVS Caremark since Ryan spearheaded the acquisition of Caremark in 2007. The nonpublic investigation has been ongoing since last August.

"It is unusual to get this kind of scrutiny from both sides of the house," said Stuart Soberman, general counsel for the National Community Pharmacists Association (NCPA).

David Balto, former FTC policy director of the Bureau of Competition and counsel for many NCPA member pharmacists, said, "Plans use PBMs because they want an honest broker to secure the lowest prices and best services. But when the PBM is owned by a large pharmacy chain, there is a clear conflict of interest."

Balto noted that the same conflict-of-interest issues arose in the 1990s when pharmaceutical manufacturers began acquiring PBMs, as when Merck acquired Medco and Lilly acquired PCS. The FTC acted by requiring the PBMs to create a strict firewall between themselves and their parent companies.

"Ultimately, because of the firewall, the PBMs were no longer an attractive investment and the manufacturers divested them," Balto said. "There is a good chance that will happen with CVS."

Good cop/bad cop

NCPA's Soberman noted that two issues predominate: the elimination of consumer choice and the "vastly overstated" savings that CVS says customers will receive through its mail-order outlets or at its retail chain stores.

Soberman told *Drug Topics* about the alleged chicanery the company uses to annex both pharmacies and their customers.

"Customers of drugstores not associated with CVS are getting letters saying they are allowed two refills of a medicine," Soberman said. "But they are told that after that, they should go to CVS or to the company's mail-order business, or they'll have to pay a higher co-pay.

"Another trick they use is good cop, bad cop. First, Caremark aggressively audits the pharmacies, taking back money for drugs that were properly dispensed, but where the I's weren't dotted and T's weren't crossed. Then the good cop comes in and says, 'Aren't you tired of audits? Why don't you sell your business to CVS?'"

Responding to these allegations, a CVS spokeswoman said that the company is cooperating with the FTC investigation. She added that the company remains confident "that our business practices and service offerings, which are designed to reduce healthcare costs and expand consumer choice, are being conducted in compliance with antitrust laws."

Insider trading inquiry

Meanwhile, in April, the Change to Win (CtW) Investment Group filed a letter of complaint with the Securities and Exchange Commission (SEC), seeking an insider trading inquiry, PR Newswire reported. CtW represents pension funds sponsored by unions with a combined membership of 5.5 million individuals.

"CtW alleges that Ryan and other top executives may have traded their shares at the same time that the company had not disclosed what it knew about how its Caremark unit was faring, news that caused CVS share price to plummet when it was finally disclosed to shareholders on November 5," William Patterson, CtW's executive director, said in a statement.

He continued, "When the 2010 business losses were finally announced to shareholders on November 5, 2009, along with the news that the company had been under investigation by the FTC … CVS share price fell 20% in one day, wiping away more than $10 billion in shareholder value."

Another executive named in the CtW inquiry are Howard McClure, an executive vice president who led Caremark at the time in question. McClure has since retired and was replaced last December by Per Lofberg, the former chairman of the now divested Merck-Medco. The CtW inquiry also mentioned David Rickard, outgoing executive vice president and chief financial officer, and Douglas A. Sgarro, executive vice president and chief legal officer.

HHS and DEA charges

CVS is also being probed by the U.S. Department of Health and Human Services (HHS) Office of Inspector General for allegedly offering potential customers gift cards, cash, merchandise, or discounts for transferring their prescriptions to CVS. The investigation is part of a larger probe by the HHS into "possible false or improper" Medicare and Medicaid claims made by the company, reported by the Providence Business News in May.

Dow Jones also reported in May that the U.S. Drug Enforcement Administration (DEA) is investigating CVS for allegedly continuing to sell the decongestant pseudoephedrine at drugstores in late 2007 and 2008, defying regulations that the drug be strictly sequestered behind pharmacy counters to prevent easy consumer access that might encourage its use in methamphetamine production.

"While the FTC probe is the most consequential of these investigative matters, since enforcement action could include fines, erection of a wall between CVS and Caremark, or even a rescinding of the merger, [all the investigations] send the message that Ryan's business tactics will no longer be tolerated," NCPA's Soberman said.

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