



Office of the Secretary

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

June 18, 2009

Mr. John M. Rector  
Senior Vice President and Special Counsel  
Ms. Joanne Thelmo  
General Counsel and Senior Vice President  
National Community Pharmacists Association  
100 Daingerfield Road  
Alexandria, VA 22314-2888

*Re: In the Matter of CVS Caremark Corporation, File No. 072-3119, Docket No. C-4259*

Dear Mr. Rector and Ms. Thelmo:

Thank you for your letter commenting on the Federal Trade Commission's consent agreement in the above-entitled proceeding. Your letter was placed on the public record pursuant to Rule 4.9(b)(6)(ii) of the Commission's Rules of Practice, 16 C.F.R. § 4.9(b)(6)(ii), and was given serious consideration by the Commission.

Your letter commends the Commission for its action, and also presents comments and recommendations which the Commission addresses below.

Several of your comments address the applicability of the order to CVS Caremark Corporation's ("CVS Caremark") pharmacy benefit management business ("PBM") and ask the Commission to investigate the privacy and security practices of the PBM. The Commission shares your interest in securing broad and effective relief and notes that the order covers all of CVS Caremark, including its PBM. Assessments performed under the order therefore must include the PBM and its practices and procedures, to the extent that the PBM maintains personal information.

Your letter also expresses concern that the order may not lead to timely correction of order violations that may occur while the order is in effect. You therefore ask the Commission to require CVS Caremark to obtain assessments every six (6) months and to report order violations to the Commission within 30 days after a violation occurs. The Commission believes that the order and available remedies for order violations appropriately address this concern, for the following reasons.

First, the order requires the company to implement appropriate practices to identify and promptly correct security deficiencies that may violate the order. Second, the order requires CVS Caremark to obtain periodic assessments of its information security program from

qualified, independent assessors. To provide assurances that, among other things, CVS Caremark identifies and corrects deficiencies appropriately, the assessor must certify that the program operated effectively throughout the reporting period. Third, the Commission may review CVS Caremark's compliance with the order at any time by requesting and examining any plans, audits, policies, and other materials related to compliance. Finally, should CVS Caremark's information security program fail to operate effectively throughout the assessment period – because, for example, the company failed to appropriately correct security deficiencies that arose during that period – the company could be in violation of the order and subject to civil monetary penalties. In sum, these provisions, which are consistent with those in numerous other FTC data security orders, provide strong incentives for the company to take appropriate steps to correct security deficiencies during an assessment period.

Further, you ask the Commission to require CVS Caremark to notify consumers affected by order violations and inform them of their rights under state and federal privacy regulations. The Commission considers a variety of factors in deciding whether notice to consumers is an appropriate remedy in a particular case, such as whether notice is already required under federal or state laws<sup>1</sup>, and whether the notice would be likely to benefit consumers under the circumstances. Here, the Commission has determined that the remedies in the proposed order – including implementing and maintaining a comprehensive information security program and obtaining independent assessments of its effectiveness every other year for 20 years – will ensure appropriate protections for consumers.

In addition, you ask the Commission to share reports of order violations with the Attorneys General of the home states of affected consumers. Commission procedures permit it to share information obtained in monitoring CVS Caremark's compliance with the proposed order with federal and state law enforcement agencies. Further, pursuant to law, compliance reports the company submits under the order will (subject to appropriate redaction) be entered onto the public record.

Finally, your letter expresses concern that information sharing between CVS Caremark's pharmacies and PBM has harmed consumers and competing pharmacies. Because this part of your comment mainly concerns the impact of these practices on competing pharmacies, the comment has been referred to the Bureau of Competition for assessment. The Commission also notes that the law violations alleged in the complaint are not based on information sharing or anti-competitive practices. Rather, the complaint alleges that the company engaged in deceptive and unfair conduct by failing to maintain reasonable and appropriate security for personal information, leading to improper disposal of the information in unsecured dumpsters around the country. To address these alleged violations, the order contains broad injunctive relief, including prohibitions against misrepresentations about the privacy and security provided to sensitive information. Further, if CVS Caremark were to violate the order, it could be subject to civil monetary penalties of up to \$16,000 per violation. The order therefore contains strong relief to

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<sup>1</sup> Current Federal law (the recently enacted American Recovery and Reinvestment Act of 2009) requires all health-related entities, including pharmacies, to notify customers of breaches of personal health information. In addition, 44 states have enacted laws requiring breach notification, some of which make public the fact that notifications have been made, and private entities routinely compile and publish information about breaches.

address the challenged conduct and also prohibits reasonably related conduct, such as misrepresentations about CVS Caremark's information sharing practices, as your letter alleges. In addition, although the order does not cover every potential violation of Section 5 of the Federal Trade Commission Act by CVS Caremark, the Commission retains the ability to bring a *de novo* Section 5 action if the circumstances warrant.

After considering your comments, the Commission has determined that the public interest would be best served by accepting the consent order. Thank you again for your letter.

By direction of the Commission.

Donald S. Clark  
Secretary