



californiapharmacistsassociation

March 19, 2009

FTC, Office of the Secretary
Room H-135, 600 Pennsylvania Ave. NW
Washington, D.C. 20580

**Re: Comments from the California Pharmacists Association on Proposed
Settlement with CVS/Caremark
File # 072-3119**

Dear FTC, Office of the Secretary:

The California Pharmacists Association (CPhA) is providing these comments on the above referenced settlement. CPhA is the largest state pharmacy association in the country, representing over 5000 pharmacists, pharmacy technicians and others in all practice settings.

We are providing these comments on the proposed settlement with CVS/Caremark reference above, which deals with violations of laws related to confidential patient records. We believe that other activities of CVS/Caremark, which we describe in these comments, warrant investigation as additional violations of patient confidentiality. As such, they bear directly on the proposed settlement, which we believe should be modified to address these concerns.

Recently, a growing number of our members in community pharmacy practice have expressed concerns regarding what we believe to be unfair and anticompetitive business practices by CVS, and its pharmacy benefits manager (PBM), Caremark. CVS is the largest pharmacy chain in the United States, operating more than 6300 pharmacies. Combined with its Caremark mail order pharmacy operations, CVS currently dispenses more than one-third of all prescriptions filled in the United States. CVS/Caremark has taken steps to implement a new benefit model which we believe to be against the best interests of the patients they ostensibly serve. This model includes the sharing and use of confidential patient information between the retail pharmacy and PBM businesses operated by CVS/Caremark without the approval of the patients involved. This results not only in disclosure of protected patient information, but the use of this information to gain an unfair business advantage for CVS pharmacies.

When CVS acquired Caremark in 2007, there was an assumption that a firewall would exist between the two entities so that, although under common ownership, they would

operate independently of one another and that confidential patient information would not be exchanged without proper authorization. This assumption is apparently referenced in the current case, in footnote 14 of the December 3, 2008 letter from the FTC to CVS/Caremark disposing of CVS/Caremark's request for a rehearing of a denial of a petition to quash or limit compulsory process. That footnote reads:

14. *See* Exhibit Y (Nobles Declaration that she is “aware that a firewall policy exists between these businesses” and that the “firewall is maintained between the CVS pharmacy business and the Caremark PBM business to separate sensitive information that each business possesses”); Exhibit Y Attachment (CVS Caremark Firewall Policy). While the Nobles Declaration refers to “sensitive information,” the attached firewall policy makes clear that it applies only to “competitively sensitive information,” *e.g.* contracts, prices, and other financial arrangements, and does not on its face apply to personal information. *See also* Exhibit Z (Balnaves Declaration that the “CVS Pharmacy business and the Caremark PBM business unit maintain separate and distinct information systems and networks that are separated by firewalls managed independently by each organization” and that “both entities currently continue to operate under a separate set of security policies, procedures and standards”). This conclusion is not supported by any documentation or any detail about any firewalls or policies, procedures, or standards.

(Emphasis added)

Based on what is happening today, whatever firewall exists is not providing any level of protection from the sharing of information between CVS and Caremark. Here in California, the Los Angeles Unified School District, which uses Caremark as its PBM, recently sent letters to LAUSD beneficiaries informing them they would be required to use either the Caremark mail order pharmacy or a local CVS retail store to fill any maintenance medications. Patients report that CVS has contacted their physicians without the patient's knowledge or approval to solicit prescriptions for their maintenance medications. The information on which these calls are made by CVS appears to be based on records of paid prescription claims obtained from Caremark. This violation of patient privacy is on a par with the dumpster incidents which triggered the settlement at issue here.

CVS/Caremark has also cancelled its contracts with many local independent pharmacies and limited other independent and non-CVS chain pharmacies to emergency prescription fills only. These contract changes, coupled with the mandated use of a CVS pharmacy or mail order facility not only has a deleterious effect on long-standing pharmacist-patient relationships and the level of pharmacy care patients receive, but also results in a unfair business advantage that is derived from and capitalizes on the unauthorized sharing of confidential patient information between CVS and Caremark. Such use of the information is unfair not only to the patients, but also to the pharmacies in the CVS/Caremark provider network, who have entered into contracts with CVS/Caremark that are now being undermined by these practices by CVS/Caremark.

Because of this unauthorized use of confidential patient information, patients with Caremark as their PBM are now essentially forced to fill their prescriptions at CVS, whether they want to or not. CVS/Caremark likely will claim that such a decision is one left to the plan sponsors, but as groups such as ours seek to bring these issues before those plan sponsors, we believe this activity is worthy of review by the FTC as part of the related investigation of the breach of patient confidentiality that CVS/Caremark is now seeking to settle.

We respectfully ask that prior to any settlement of this case that the FTC thoroughly investigate the above disclosures and use of patient information by CVS/Caremark as well as the contracting practices that flow directly from the use of the information that is shared between these two businesses owned by CVS/Caremark. We request as well that appropriate restrictions on the use of patient information be included in the settlement to prevent CVS/Caremark from using the information to obtain an unfair business advantage for CVS Pharmacies.

Sincerely,

John Cronin, Pharm.D., J.D.

Legal Counsel