

November 20, 2009

Georgina Verdugo, Director  
Office for Civil Rights  
U.S. Department of Health and Human Services  
200 Independence Avenue S.W.  
Washington, D.C. 20201

Jon Leibowitz, Chairman  
Federal Trade Commission  
600 Pennsylvania Avenue N.W.  
Washington, D.C. 20580

**Subject: CVS Caremark Egregious Disregard of Protected Healthcare Information**

Dear Director Verdugo and Chairman Leibowitz:

On behalf of the undersigned organizations, I am writing to bring to your attention significant violations of HIPAA privacy standards by the CVS Caremark Corporation. In 2007, CVS, a pharmacy operator, merged with the Caremark Corporation, a pharmacy benefits manager. Since that time, and in light of unfair and deceptive business practices, the National Community Pharmacists Association (NCPA) as well as numerous members of Congress have called upon the Federal Trade Commission to retrospectively examine the completed merger due to troubling anti-trust allegations. NCPA represents the pharmacist owners, managers and employees of more than 22,000 independent community pharmacies across the United States. The nation's independent pharmacies, independent pharmacy franchises and independent chains dispense nearly half of the nation's retail prescription medicines.

In support of this effort, NCPA has been collecting examples of CVS Caremark misconduct from pharmacist members and their patients since early 2009. We have collected over 300 complaints covering a wide range of deceptive, fraudulent or otherwise egregious practices. One of the most common complaints we have received clearly indicates that CVS Caremark, in its role as a pharmacy benefits manager, has been accessing protected health information entrusted to them for pharmacy claims administration by health plans and competitor pharmacies in order to steer patients to CVS pharmacies for their own financial gain. Elderly patients or those with disabilities—typically prescribed multiple medications—may be particularly susceptible to erroneous or misleading misrepresentations by CVS Caremark relative to their prescription drug coverage or where they may fill their prescriptions. Also, in light of the fact that CVS Caremark has been cited for HIPAA violations in the recent past, we feel that the examples that we have collected speak to a systemic, corporation-wide disregard for health care information privacy.

## **CVS Caremark Inappropriately Uses Protected Healthcare Information for Financial Gain**

Typically, a patient will receive a letter in the mail from CVS Caremark that indicates that “according to their records” the patient has recently filled a prescription for a certain drug on a certain date at a pharmacy other than CVS. The letter includes the specific drug name, the date of the patient’s last refill and the name of their pharmacy. The letter then includes instructions urging the patient to obtain all future refills at a CVS retail or mail order pharmacy. We have also collected some examples where patients have received similar letters that list their entire prescription fill history for the previous year, including the patient’s medications, the dates of each refill, and all pharmacies used. These letters also urge patients to switch their prescriptions to CVS. Many times, upon receipt of such a letter, the consumer will visit their community pharmacist, oftentimes an independent pharmacy, confused and upset that CVS has access to their protected health information.

At the time that the CVS Caremark merger was contemplated and approved, CVS Caremark principals assured FTC officials that there would be a “firewall” between the pharmacy benefit management functions of the corporation and the retail pharmacy function. It is obvious that a firewall is clearly not operational or is being blatantly circumvented.

## **CVS Caremark Practices Violate Patient Privacy Laws**

While CVS Caremark is a single corporation, the Caremark PBM is a business associate of the health plan as well as a business associate of the pharmacy. Caremark is using the information it obtains from a non-CVS pharmacy to market to the health plan’s covered individuals the use of CVS pharmacies for its own gain. This is a particular concern with the so-called "Maintenance Choice" program, where CVS Caremark claims to be promoting the use of its own mail order operation or its own CVS pharmacies at the request of the plan sponsor. Evidence suggests that this is not always the case or is in many cases unclear. HIPAA privacy rules expressly require an authorization for uses or disclosures of protected health information (personally identifiable to the patient) for all marketing communications except for face-to-face encounters or promotional gifts of a nominal value. Moreover, the action makes it appear that the non-CVS pharmacy is violating patient's privacy protections by providing PHI to other pharmacies, which it is not in fact doing.

There are several exceptions to the definition of marketing including those for treatment communications and certain health care operations under 45 CFR 164.501. CVS Caremark’s use of protected health information to drive consumers to CVS pharmacies to increase its market share of the retail pharmacy industry and overall profit margin does not fall within any of these categories. These letters are not health related or for the purposes of care coordination but are being sent with a clear expectation of direct remuneration back to CVS Caremark. CVS Caremark may try to make the disingenuous argument that such communications were sent to encourage medication adherence or to

“remind” patients to refill their prescriptions. The fact that patients are directly instructed to stop using the pharmacy that they have already chosen in lieu of a CVS pharmacy and CVS Caremark (as a business associate of the health plan) would directly reap a financial benefit from patients is a violation of a patient's right to have their PHI protected. Also, if these are indeed “reminder letters” or designed to simply relay information about the plan structure, there is absolutely no reason why the correspondence should include the names of the medications, fill dates and names of the non-CVS pharmacies where these medications were obtained.

### **CVS/Caremark as “Business Associate” Now Directly Liable Under New ARRA HIPAA Modifications**

Under the American Recovery and Reinvestment Act or Stimulus Bill that was signed into law on February 17, 2009, business associates must now directly comply with HIPAA rules and are subject to HIPAA civil and criminal penalties. In addition, these enhancements to existing HIPAA rules also include tiered enforcement with the highest penalties reserved for “willful violations.” The misappropriation of protected health information by CVS Caremark for its own financial gain that has been highlighted in this correspondence is in no way unintentional or the result of a mistake. The sheer number of letters that we have been able to collect secondhand—by patients that have shared their letters and concerns with their community pharmacists—indicate a systematic plan by CVS Caremark to use information that has been entrusted to them by the health plan sponsor to process pharmacy claims to willfully misappropriate such data to enhance their own financial bottom line.

### **CVS Caremark Causing Harm to Pharmacy Patients**

In addition, a significant number of these types of letters involve protected health information that may be considered particularly sensitive. The letters that have been highlighted in this correspondence specifically list the names of the prescription medications that have been prescribed to the covered beneficiary. Many of the letters involve medications specifically prescribed to treat sensitive medical conditions—the type of information that patients typically have a greater expectation or need for confidentiality.

The patients that have received the marketing letters from CVS Caremark are extremely upset that their medical information is being accessed and manipulated not for the coordination of their medical care but for the financial gain of a business associate of their health plan. Patients are concerned that CVS Caremark is sending completely unsolicited PHI that is unnecessary for plan administration through the mail without considering the considerable and irreparable harm that may ensue if such correspondence is sent to an outdated address or delivered to the wrong home. These consumers are also fearful about what other endeavors CVS Caremark may be using their protected health information for or what other entities may now be able to access this data. In addition,

many consumers that have not been CVS pharmacy customers in the past, are receiving letters from CVS Caremark offering them a “CVS Caremark ExtraCare Card” for discounts solely on CVS brand products and for “instant savings on items featured in CVS weekly circulars.” This blatant marketing technique is being mischaracterized as “an exclusive health benefit to valued plan participants.”

We would appreciate the opportunity to meet with your offices to discuss our concerns directly and to share the redacted letters that we have collected. We have also shared these examples with the Federal Trade Commission under a theory of general consumer protection but have not specifically raised the HIPAA violation implications to date. The egregious violations raised in this letter may be suitable for a joint OCR/FTC enforcement action. We would appreciate the chance to meet with you to discuss our concerns in greater detail. Please contact John M. Coster, PhD., R.Ph., Senior Vice President of Government Affairs at NCPA ([john.coster@ncpanet.org](mailto:john.coster@ncpanet.org)) or (703) 838-1184 to arrange a mutually acceptable date and time.

Sincerely,

**National Community Pharmacists Association**

**Consumer Action**

**US PIRG**

**Patient Privacy Rights**

**Privacy Journal**

**Private Citizen, Inc.**

**Privacy Rights Clearinghouse**