VETERANS
AIMED
TOWARD
AWARENESS
A Not for Profit Service Organization

Tax ID Number 51-0388432

March 21, 2003

Janet Woodcock, MD
Dockets Management Branch (HFA-305)
Food and Drug Administration
5630 Fishers Lane, Room 1061
Rockville, MD 20852

RE: 02P-0163 Wellpoint Petition requesting that the FDA exempt Clarinex (desloratadine) from the prescription dispensing requirements thereby switching Clarinex to over-the-counter status.

Veterans Aimed Toward Awareness, Inc a 501(c)3 non-profit veterans' service organization requests that the attached documents be entered into this docket. The materials include the summary findings of the Maryland Insurance Commissioner with respect to the attempted acquisition and conversion of Carefirst to the Wellpoint Health Network. This network is the author of the petition in this docket.

The Maryland Insurance Commission's review of Wellpoint is the most through on record. Their findings included the fact that "Wellpoint refused to produce certain documents critical to the inquiry" making it impossible for the Commission to "ensure that the affected communities will have continued access to affordable health care."

Many former military service personnel are located in the area served by Carefirst. It has become completely clear to us that Wellpoint makes no move that is not motivated by their bottom-line. As they are a publicly traded company, this is perfectly acceptable. However, unless the FDA is willing to dig as deeply as the Maryland Insurance Commission did to determine whether or not their request to push desloratadine OTC—thereby shifting the cost of allergy medication completely out of their hands—FDA must also thoroughly examine, in the words of the Maryland Insurance Commission, "that the affected communities will have continued access to affordable health care" as may be impacted by your involvement in this citizens' petition.

Sincerely,
Terry Baker
CEO

02P-0163

C2

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FOR IMMEDIATE RELEASE

MARYLAND INSURANCE COMMISSIONER DENIES CAREFIRST CONVERSION AND SALE

ANNAPOLIS, MD (March 5, 2003) -- Maryland Insurance Commissioner Steven B. Larsen today announced he has denied the CareFirst BlueCross BlueShield application to convert to a for-profit company and be acquired by WellPoint Health Networks, Inc.

In his order and accompanying 250 page report, Commissioner Larsen explained his rationale for the decision. That rationale is contained in the attached Summary.

The decision concludes a 14-month process undertaken by the Maryland Insurance Administration. That process, outlined in the Maryland State Government statute, Title 6.5-101, included 15 days of hearings, eight Opportunities for Public Comment held across Maryland, seven expert reports, and more than 87,000 pages of documents reviewed. Commissioner Larsen heard from more than 250 people during the Public Comment sessions and received more than 300 written comments via email and letters from citizens.

According to Maryland law, the Commissioner's decision is held for 90 days during which time the Maryland General Assembly can review the decision and decide whether to take any further action. CareFirst has the right to appeal the Commissioner's decision within 30 days.

-30-

Summary of Key Points

Review by the Maryland Insurance Administration ("MIA") of the Application of CareFirst to Convert and be Acquired by WellPoint

March 5, 2003

Note: This document is an informal summary of the MIA's Order and Exhibit A in Case No: 2003-02-032. That Order and Exhibit together constitute the decision of the MIA.

I. PROCESS

- Began January 2002 with filing of application
- MIA hired experts, investment bankers, lawyers and actuaries at WellPoint's expense
- Issued subpoenas and requests for information
- Held statewide hearings for public comment
- Held 15 days of public testimony
- Conducted numerous depositions

II. THE CONVERSION STATUTE

- The general standard: Is the transaction in the public interest?
- The "*disqualifying factors*"- factors that, if not remedied, compel a finding, as a matter of law, that the transaction is not in the public interest.
- The "*mandatory considerations*" - factors that bear on whether the transaction is in the public interest, but do not compel a finding either way.

III. "DISQUALIFYING FACTOR": HAVE STEPS BEEN TAKEN TO ENSURE THE MARLAND HEALTH CARE FOUNDATION WILL RECEIVE THE "FAIR VALUE" OF THE PUBLIC ASSETS?

- The auction for CareFirst was flawed and did not produce fair market value.
  - The auction appeared designed to, and did, end in a tie on price.
    - WellPoint was coached to match Trigon's bid, but Trigon was not asked to increase its initial bid.
    - A tie facilitated negotiations on nonprice issues such as bonuses, the role of management in the new organization and Board representation. These nonprice issues may have affected price.
    - CareFirst was improperly relying on the regulatory process to set the price as a substitute for price competition between willing buyers.
  - The purchase price is outside the valuation range identified by the MIA's investment bankers.

IV. "DISQUALIFYING FACTOR": HAVE STEPS BEEN TAKEN TO ENSURE THE ANTI-BONUS PROVISION HAS NOT BEEN VIOLATED AND THERE IS NO "INUREMENT" OF PUBLIC ASSETS TO MANAGEMENT?

- The original merger bonuses violated the anti-inurement requirements of the conversion statute.
  - The original merger incentives were considered a "critical" component of the transaction and were forced on the bidders as a "take it or leave it" proposition.
  - Both bidders objected to the bonuses, and the Board ignored numerous other warning signs the bonuses were inappropriate.
  - The approval of the bonuses in connection with the transaction was an abdication of the Board's duties of care and loyalty to CareFirst.

- CareFirst and WellPoint renegotiated the original merger incentives.
  - The new "retention bonuses" violate the anti-bonus provision in the conversion statute because they are not compensation for work performed with WellPoint.
  - Because management continued to insist on the payment of bonuses in connection with the transaction, the bonuses may still constitute inurement because WellPoint may have been willing to increase the purchase price even more had management not required retention bonuses.

V. "MANDATORY CONSIDERATION": DID THE BOARD ACT WITH "DUE DILIGENCE" IN DECIDING TO CONVERT?

- The Board breached its fiduciary obligations in deciding to convert because it failed to recognize the nonprofit mission of the company to offer insurance at "minimum cost and expense".
  - Management had unilaterally adopted a for-profit orientation and the Board took no action to question the appropriateness of this new direction.
  - There is a distinction between the duties of a nonprofit board and a for-profit Board. The for-profit Board owes its duties first to the shareholders. The nonprofit board has a duty to carry out the nonprofit purpose of the corporation.
  - There is no evidence that the Board considered the nonprofit mission of the company in its strategic planning.

- The conversion effort was triggered in part by a strategic plan that was premised on CareFirst's need to: access more capital, more than double its size, and maintain a "relative market share" of three times its competitors.
  - CareFirst has adequate capital to fund its capital investment needs, such as IT infrastructure, eCommerce, and product development.
    - Even CareFirst's own advisor estimated that, other than needs for acquisitions, CareFirst could fund its capital requirements.
    - CareFirst is outspending many nonprofit and for-profit Blues plans in terms of capital investment.

- CareFirst is already the dominant health insurer in the State. In some markets it has almost 50% of the market. Antitrust laws may prohibit efforts to buy in-market competitors and enhance "relative market share".
- The Board did not consider the risks associated with growth, nor did it properly assess whether prior integration efforts with Washington D.C. and Delaware were complete. These efforts are behind schedule.
- The data show that bigger is not necessarily better. CareFirst's own advisor believed there were only limited benefits to "absolute scale".

- CareFirst's ability to meet its capital spending requirements may be even greater than believed because of lax oversight over the financial performance of the company by the Board.
  - While the company has blamed external factors for the "weak" performance of the Maryland plan, the MIA analysis suggests the causes are often the result of management decisions.
  - CareFirst is subsidizing tens of millions of dollars in losses incurred by medical groups it does not own, and in some cases is subsidizing the losses of its competitors whose members use doctors in these groups.
  - CareFirst lost $24 million on "non-risk" business in 2001.
  - CareFirst wrote off $22 million on a failed computer project.

V. "MANDATORY CONSIDERATION": DID THE BOARD ACT WITH "DUE DILIGENCE" IN SELECTING THE BIDDER AND IN NEGOTIATING THE TERMS AND CONDITIONS OF THE TRANSACTION?

- The Board permitted the use of selection criteria for bidders that largely benefited management, such as the willingness of the buyer to pay the merger incentive, and the role that the CEO would play in the successor organization.
  - WellPoint objected to, but ultimately agreed to pay the merger incentive.
  - Trigon offered the CareFirst CEO the chairmanship of the Trigon Board and four additional seats on the Board, compared to one seat being offered by WellPoint. Trigon was rejected in part because the CareFirst CEO wanted to be the CEO of the combined company.

- Although the Board appeared to weigh certain factors in the selection process, such as the locations of corporate headquarters, possible job loss, "downside protection" and maintaining current benefit levels for CareFirst employees, on closer scrutiny, these factors appear to have little or no merit.
  - Offers by the two bidders regarding corporate headquarters were ranked equally in internal CareFirst documents, yet WellPoint's was claimed to be superior by CareFirst.
  - Trigon offered an acceptable alternative to WellPoint's "downside protection". CareFirst filings do not acknowledge this fact.
  - Concerns about job loss associated with a Trigon deal were dismissed or resurrected depending on whether Trigon was in or out of favor, and was not originally viewed as a problem by CareFirst staff or its investment banker.

- WellPoint's offer to maintain employee benefits is temporary.
- WellPoint's offer of a Southeast Regional headquarters is temporary.
- WellPoint has made no commitment to provide CareFirst "access to capital".
- WellPoint does not enhance CareFirst's "relative market share".
- WellPoint's offer provides less "control" than does Trigon's offer.

VI. "MANDATORY CONSIDERATION": WERE ALL CONFLICTS OF INTEREST OF OFFICERS, DIRECTORS, OR EXPERTS DISCLOSED TO THE BOARD?

- Unbeknownst to the Board of Directors, an attorney who previously represented the CareFirst CEO in his employment negotiations with the Board played a significant role in advising CareFirst management during negotiations with potential bidders. The Board does not believe the attorney was representing CareFirst.
- CareFirst's investment bankers were asked by the Board to issue an opinion on the "fairness" of WellPoint's purchase price. The bankers' compensation largely depended on the issuance of an opinion that the price they negotiated was fair.
- CareFirst used the same consultant to opine on whether the transaction with WellPoint would negatively impact access and affordability that it used to recommend the strategy that led to the transaction. This consulting firm also received millions of dollars in fees from WellPoint.

VII. "MANDATORY CONSIDERATION": WILL THE TRANSACTION HAVE A SIGNIFICANT IMPACT ON THE AVAILABILITY OR AFFORDABILITY OF HEALTH CARE IN MARYLAND?

- WellPoint did not make available to the MIA and its experts pricing and underwriting information that would have permitted a complete "impact analysis".
- Conclusions drawn from secondary information were mixed.
  - WellPoint of California is not ranked highly by providers on many issues. It is viewed as a tough negotiator and has been sued by hospitals.
    - WellPoint defends its efforts as a way to contain costs. It could not be determined whether WellPoint's tough negotiation style reduces premiums or simply adds to shareholder value.
    - Poor provider relations, including low reimbursement, can lead to network adequacy problems and can impact quality.
  - WellPoint has shown growth in membership in California. However, its products have fewer benefits than in Maryland. WellPoint could not offer the range of products here as it could in California.
  - Industry-wide data do not suggest premiums of for-profit HMOs are higher than nonprofit HMOs.
  - WellPoint will seek to improve the loss ratio in Maryland, which could result in rate increases. This possibility could be mitigated through the regulatory review of rates by the MIA, but that review has limited use as a tool to contain rate increases because the MIA does not regulate profit margins.

STATE OF MARYLAND
MARYLAND INSURANCE ADMINISTRATION

IN RE:	*	
The Consolidated Application for the Conversion of CareFirst, Inc. and CareFirst of Maryland, Inc. to For-Profit Status and the Acquisition of CareFirst, Inc. by WellPoint Health Networks, Inc.	*	MIA No: 2003-02-032

* * * * *

ORDER

On January 11, 2002, CareFirst, Inc. ("CareFirst"), CareFirst of Maryland, Inc. ("BCBS-MD"), and WellPoint Health Networks, Inc. ("WellPoint") filed with the Maryland Insurance Administration (the "MIA") a consolidated document denominated "FORM A STATEMENT REGARDING THE ACQUISITION OF CONTROL OF OR MERGER WITH A DOMESTIC INSURER" (the "Application" or "Form A"). CareFirst and BCBS-MD are non-profit, non-stock domestic corporations incorporated in the State of Maryland and licensed by the MIA as non-profit health service plans. CareFirst is the sole member of BCBS-MD. CareFirst also is the sole member of Group Hospitalization and Medical Services, Inc., a non-stock, non-profit corporation organized under federal law ("BCBS-NCA") and BCBSD, Inc., a Delaware non-profit, non-stock corporation ("BCBSD"), each of which owns various for-profit insurance related subsidiaries. BCBS-NCA holds a certificate of authority from the MIA to act as a non-profit health service plan in Maryland.

The Application sought the prior approval of the Insurance Commissioner of the State of Maryland for: (i) the conversion of CareFirst and of BCBS-MD to for-profit

status pursuant to Title 6.5 of the State Government Article; and (ii) the subsequent and immediate acquisition of control of CareFirst, and the indirect control of its subsidiaries (including BCBS-MD, BCBS-NCA,BCBSD and their wholly owned for-profit subsidiaries), by WellPoint. On January 17, 2003, CareFirst and WellPoint submitted an amended Application to the MIA. The Amended Application included an "AMENDED AND RESTATED AGREEMENT AND PLAN OF MERGER." (The transaction contemplated by the Application and the Amended Application are hereinafter referred to as the "Proposed Transaction.").

I have reviewed the Application and the Amended Application, together with all filings, documents, and materials (including expert reports) submitted therewith by CareFirst and by WellPoint. In accordance with Title 6.5 of the State Government Article and Title 7 of the Insurance Article, I have conducted an exhaustive and detailed investigation of the Proposed Transaction. Public hearings were held. Depositions were taken. Documents were requested. Experts were engaged by the MIA to review critical aspects of the Proposed Transaction.

After a careful consideration of all of the materials supplied and all of the testimony given, I am constrained to deny the Amended Application and to disapprove the Proposed Transaction. The reasons for the disapproval, including a summary and analysis of the record, and conclusions are set forth in the Report by the Maryland Insurance Administration on the Proposed Conversion of CareFirst to For-Profit Status and Acquisition by WellPoint, (the "Report") which Report is attached hereto, and incorporated in its entirety by reference herein, as Exhibit A.

In summary:

1. It is my conclusion under Title 6.5 of the State Government Article that the Amended Application for the conversion of CareFirst, Inc. and CareFirst of Maryland, Inc. is not in the public interest and, I find that:

a. Appropriate steps were not taken to ensure that the value of the public assets of CareFirst and of BCBS-MD are safeguarded;

b. Appropriate steps were not taken to ensure that no part of the public assets of the acquisition inured directly or indirectly to officers of CareFirst and of BCBS-MD;

c. Appropriate steps were not taken to ensure that no officer of CareFirst or of BCBS-MD receives any immediate or future remuneration as the result of the Proposed Transaction except in the form of compensation paid for continued employment with WellPoint;

d. CareFirst did not exercise due diligence in deciding to engage in an acquisition, selecting the transferee, and negotiating the terms and conditions of the acquisition;

e. The procedures that CareFirst used in making the decision to convert and to be acquired were flawed;

f. Conflicts of interest existed that either were not disclosed or were not appreciated or considered by CareFirst;

g. The Purchase Price does not reflect the fair value of CareFirst;

h. Because WellPoint refused to produce certain documents critical to the inquiry, I am unable to conclusively determine on this record whether the Proposed Transaction has the likelihood of creating a significant adverse effect on the availability or accessibility of health care services in the affected communities, but there is evidence that the proposed transaction could have such an impact; and

i. Because WellPoint refused to produce certain documents critical to the inquiry, I am unable to evaluate sufficiently on this record whether the Proposed Transaction includes sufficient safeguards to ensure that the affected communities will have continued access to affordable health care.

j. The Proposed Transaction is not equitable to insureds and certificate holders of BCBS-MD or of the Maryland insureds and certificate holders of BCBS-NCA.

2. It is my conclusion that the proposed conversion of BCBS-NCA falls within the scope of Title 6.5 of the State Government Article. Pursuant to § 6.5-307, Title 6.5 does not apply to the acquisition of a foreign non-profit health entity if the appropriate regulating entity determines, based on the standards set forth in that title, that any public or charitable assets of the non-profit that serve health care needs in this State will be adequately protected. Because I find that the proposed purchase price for CareFirst does not reflect the fair value of CareFirst, I find that Title 6.5 does apply to the proposed conversion and acquisition of BCBS-NCA and, for the reasons set forth above in paragraph 1, and as otherwise set forth in the Report, find that the Proposed Transaction as it applies to the operations of BCBS-NCA in Maryland are not in the public interest.

3. It is also my conclusion that because BCBS-NSA is a subsidiary or affiliate of CareFirst, Inc., a Maryland non-profit health service plan, the conversion of BCBS-NCA should be disapproved under § 14-133 of the Insurance Article for the reasons set forth in the Report.

4. It is my conclusion under Title 7 of the Insurance Article that the Amended Application for the acquisition of CareFirst, Inc., and the indirect acquisition of BCBS-MD and its wholly owned subsidiaries, by Wellpoint Health Networks, Inc. must be disapproved under § 7-306(b), and I find that the interests of the policyholders of BCBS-MD and its wholly owned subsidiary insurers might be prejudiced, impaired, or not properly protected.

For these reasons, and as otherwise set forth in the Report, it is the **5th** day of March, 2003, **ORDERED** by the Maryland Insurance Commissioner that:

A. The Form A Statement Regarding the Acquisition of Control of or Merger with a Domestic Insurer filed by CareFirst, BCBS-MD, and WellPoint on January 11, 2002 and amended on January 17, 2003 is **DENIED**;

B. The Proposed Transaction reflected in the Form A is hereby **DISAPPROVED**; and

C. This Order is a final decision of the Insurance Commissioner.

D. This Order shall be effective 90 calendar days from the date of this Order; and

E. **ORDERED** that the records and publications of the Maryland Insurance Administration reflect this decision.

STEVEN B. LARSEN
MARYLAND INSURANCE COMMISSIONER